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The trial of Robert Swan.



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THE TRIAL

Thos. J. Eastman
OF

ROBERT SWAN

CHARGED

WITH THE MURDER

OF

WILLIAM O. SPRIGG,

IN THE

CIRCUIT COURT FOR WASHINGTON COUNTY,

JULY TERM, 1853.

HAGERSTOWN:

HEARD & WILLIAMS, "PEOPLE'S OWN" OFFICE:
1853.

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PREFACE.

The trial of Robert Swan, charged with the Murder of William O. Sprigg of Jos., was commenced in the Circuit Court for Allegany County at the April Term, 1852. Judge Perry—the presiding judge, feeling himself disqualified to sit in the case, in consequence of the relations between himself and the prisoner's family—declined to act as judge; and the counsel for the prisoner and Mr. Gordon, the State's Attorney for Allegany County, by agreement, selected the Hon. Joseph I. Merrick of Hagerstown, to preside.

On the 6th day of May—Judge Merrick on the bench—the trial of this exciting, and profoundly interesting case was commenced in Cumberland.

The State's Attorney having applied to the Governor to appoint counsel to assist in the prosecution of the case, Henry May, Esq., of Baltimore City was appointed, and appeared at the trial in behalf of the State.

Ex-Gov. Francis Thomas, William Price, George A. Pearre, Daniel Blocher, Thomas Devecmon and J. P. Roman, appeared for the defence. On the 10th day of May, after two jurors had been sworn, Mr. Gordon moved the Court, that the record in this case be transmitted to the Circuit Court for Washington County. And sustaining his motion by his affidavit, that a fair and impartial trial of the cause could not be had in Allegany County, the Court ordered the record to be transmitted to Washington County, and the case to be tried there.

On the following day, after considerable argument, Robert Swan was admitted to bail in the sum of \$30,000 to appear for trial at the Circuit Court for Washington County.

At the July term, 1852, of that Court no jury having been empannelled, and no case of any kind being tried, this case was continued until the November term.

At the November term the prisoner was arraigned and plead "Not Guilty." But Judge Merrick conceiving himself ex-officio in the case, he having been selected to try the case in Allegany and not in Washington County, the cause stood without a Judge to try it. Mr. Harbine, the State's Attorney for Washington County, proposed to the counsel for the defence, that they select a Judge to try the case as had been done in Allegany. The defence refused to enter into such agreement. The State then requested the Clerk to notify Judge Nelson, of the adjoining Circuit Court, of the predicament of the case,

whose duty upon such notice, under the Act of Assembly, 1852, ch. 67, is to appoint some person to try any case where the presiding Judge is disqualified, from any cause, from sitting, and where counsel cannot agree as to selecting another. The recognizances were then respited, and the case continued until the March term, 1853.

The counsel for the State and for the defence appearing at the March term, it was discovered that Judge Nelson had failed to secure the services of a judge in this case. The season of the year being particularly unfavorable to the accomplishment of the purpose, as most of the Courts in the State were either then in session or had just closed, and the profession everywhere unusually pressed with business.

The case was again continued until the July term. And the Hon. John S. Tyson, of Howard County, having been duly appointed, appeared in Court at the July term, 1853, qualified, and took his seat as Judge in the case of the State vs. Robert Swan.

Mr. Price, for the defence, stated to the Court that in consequence of the uncertainties and delays attending this case hitherto, the witnesses were scattered to their homes in various parts of the Union, and the prevalence of the cholera in the immediate neighborhood of Hagerstown, rendered it exceedingly improbable that the attendance of those nearer at home could be had at the Court at this time, and proposed to postpone the case until the first Monday in September. To this the State's Attorney agreed; and the case was accordingly postponed.

TRIAL OF ROBERT SWAN.

MONDAY, SEPTEMBER 5.

The Court was called at 11 o'clock, A. M., His Honor Judge Tyson on the Bench. On the part of the State, appeared as council, Henry May, Esq., of Baltimore city, present by special appointment of the Governor, Thomas Harbine, Esq., Prosecuting Attorney for Washington county, and J. H. Gordon, Esq., Prosecuting Attorney for Allegany county; on the part of the defence appeared Jervis Spencer, Esq., of Baltimore city, and William Price and George A. Pearre, Esquires, of Allegany county. The prisoner was in the Court.

The Court asked if the counsel in the case were ready for trial.

Mr. HARBINE announced that the State was ready.

Mr. PRICE, on the part of the defence, said they were very desirous to try the case, and would be ready; but the appearance of the cholera at Cumberland, by scattering the population of that place, had rendered it impossible to get their witnesses in Court this morning. From information in his possession, they would arrive to-day or to-morrow. A part of the counsel for the defence was also absent. Mr. Roman was sick in Baltimore, but had signified his ability by letter to be present on Wednesday; Governor Thomas, also absent, had done the same. While he assured the Court they had no desire to postpone the trial, it was usual in such cases to give time to prepare, and he asked for the adjournment of the Court to give time for the arrival of the absent witnesses and counsel.

Mr. HARBINE replied that the State did not wish to force the defence to a trial before it was fully prepared; that he was aware of the facts stated in regard to witnesses, the State finding herself in much the same predicament. He had no objection not to take up the case till to-morrow, but did not wish to see it longer postponed.

Mr. PRICE stated he had merely appealed to the Court to postpone for several days.

Mr. PEARRE said that himself had only returned to Cumberland a couple days ago, to find nearly all the witnesses on both sides absent from that place. Four or five new cases of disease had recently appeared in that place, and the influence of such news on absent witnesses might defer their return. He could not, therefore, say, with any degree of certainty, when they could be ready, but hoped to be so by to-morrow, or at the farth-

est by Wednesday. It was the anxiety and wish of the defence to have the case disposed of at the present term.

Mr. GORDON disclaimed any intention on the part of the State to force the defence to a premature trial. But both counsel and witnesses are anxious to proceed. It was expected it would take some time to secure a jury; many witnesses, anticipating such a difficulty, had assured him they would be present about the second or third day of the term, expecting the jury will have been empaneled by that time. He had no objection to adjourn till to-morrow, but thought they might then proceed with the trial, and doubted not that by the time the jury was full, the defence would find its witnesses present. The case was one attended with much expense, which they were anxious to save as far as consistent with the ends of justice.

His Honor said he was aware of the peculiar circumstances attending the case, and was willing to adopt their proceedings to their necessity thus brought about. The Court had understood at the appearance of the case at the July term, that the case would be certainly for trial on this day of the adjourned session. No postponement could be granted, but to subserve the ends of justice time would be given for the appearance of witnesses. The Court would adjourn over till to-morrow.

Mr. GORDON asked attachments for each of their witnesses that had not appeared.

Mr. HARBINE moved the admission of Henry May, Esq., of Baltimore city, to practice at this Bar.

Mr. May was accordingly admitted, and took the usual oath.

Mr. GORDON asked for an order for attachment of such of their witnesses as did not appear, so that they could order such as they chose.

The Court granted it, and a like order for the use of defence.

At the request of the counsel the names of the witnesses were called over, first for the defence, and then for the State. Very few answered; but it was understood many more would arrive in the course of the day.

The Court stated as there was nothing further for its consideration, it would adjourn till to-morrow morning at 10 o'clock.

TUESDAY, SEPTEMBER 6.

Court was called at 10 o'clock, A. M., Judge Tyson on the Bench.

His Honor inquired if the counsel were ready to proceed with the case.

Both sides answered in the affirmative.

The counsel in the case had agreed, in the interim, upon the following questions to be asked of each Juror, as testing his qualifications to sit upon the case, viz :

1st. Have you any conscientious scruples in regard to capital punishment?

2d. Would your scruples on this subject prevent your agreeing to a true and impartial verdict in this cause, according to law and evidence, even although the consequence of that verdict might be death?

3d. Have you formed or expressed an opinion as to the guilt or innocence of the prisoner?

4th. Have you formed or expressed that opinion from common report, from witnesses, or from reading newspaper or other reports?

5th. Have you deliberately formed such opinion, and is it a decided one?

6th. Will anything you have heard, said, or read, respecting the prisoner, influence your mind as a juror in the determination of this case?

The questions were approved by the Court, whereupon the members of the regular jury were called, one by one, and sworn, *voir dire*. The above questions were then propounded to them, and from their answers the Judge decided upon their fitness for jurors.

But three were chosen from the panel—Messrs. David H. Keedy, John Wolf and Joseph Murry.

The Sheriff was ordered to subpoena one hundred talesmen; and the Court adjourned to meet at 11 o'clock to-morrow morning, to give the Sheriff time to make his selections.

WEDNESDAY, SEPTEMBER 7.

Gov. Thomas, one of the counsel for the defence, appeared in Court.

Mr. PRICE asked for the balance of the day for an examination of the list of talesmen, and quoted an example in the case of Burr, in support of the request.

Mr. HARBINE, upon consultation with counsel for the State, was not opposed to an adjournment for this purpose, but hoped the next morning would find all parties prepared for trial.

Judge TYSON conceded the right of counsel to demand time for such an examination, and Court was adjourned accordingly, until to-morrow morning at 9 o'clock.

THURSDAY, SEPTEMBER 8.

Court met pursuant to adjournment. The Clerk proceeded to call the list of talesmen, who were each sworn upon their *voir dire* according to the formula agreed upon by counsel, when the following jurymen were qualified and sworn:—C. G. Downs, Henry Landis, Andrew Brumbaugh, Wm. C. Kirkhart, James Kridler, Peter Eichelberger, Peter Middlekauff.

During the examination a point was raised with reference to what constituted a disqualification of a jurymen entertaining con-

scientious scruples with regard to capital punishment; and being argued by counsel, it was decided that mere opposition to capital punishment from motives of policy, and not founded upon conscientious scruples, did not disqualify a juror.

The defence took the position, that where the juror entertained an opposition to capital punishment, from motives of policy, but had no religious scruples, and would, if sworn, feel bound, as a good citizen, to return a verdict of guilty, if the evidence warranted it, in a case of murder in the first degree—death being the penalty, and where he had no opinion or préjudice against capital punishment rising superior to the law of the land, he was legally competent to serve.

A question was also raised with reference to the right of the State to reject a juror after the defence had accepted him, under the decision of the Court, as to his qualification. The counsel for the prisoner contended that after a juror was sworn upon his *voir dire* as to his competency, the State have no right to challenge him. A juror was described as one of that invisible tribunal, spoken of by Mr. Duponso, that assembles to decide upon questions of right, performs its mission, and as invisibly disperses; as one who comes up from the country as a judge in a case in which he can have no interest, and being qualified upon his *voir dire*, the State had no right to challenge, after the juror had been chosen by the prisoner. The defence, however, had the right to peremptory challenge, after the qualification of a juror by the Court, and accepted by the State.

The counsel for the State contended for their right to challenge the juror for favor, after such qualification; for, before his acceptance, they were not aware of the intention of the defence with regard to him. The discussion was deemed unnecessary by the Court, as the counsel for the State had not determined to challenge the juror; and he was sworn.

Of the one hundred talesmen, seventy-six were rejected; eleven challenged and seven qualified. Being exhausted, a new tally of thirty was ordered by the Court, with attachments for the jurors who did not answer.

Two more jurors were required to complete the panel.

Court adjourned untill to-morrow at 11 o'clock, A. M.

FRIDAY, SEPTEMBER 9.

The Sheriff having returned a list of thirty talesmen ordered the day previous, they were called and put upon their *voir dire*. Twenty-five disqualified themselves by their answers to the questions propounded by the Court; four were peremptorily challenged by the counsel for the defence; and one (James C. Bowers) was chosen.

The Sheriff was thereupon directed to summon ten more

talesmen—there being but one more jurymen wanted; and the Court took a recess from about 12 to 4 o'clock.

The Court again assembling, nine of the ten talesmen were set aside for cause, and the tenth (Jacob J. Hershberger,) was selected—thus completing the requisite number of jurymen.

The right of counsel for the defence to challenge, was exhausted with the morning session. The jury was selected out of one hundred and sixty-four summons, including the regular panel of twenty-four.

Mr. Price, one of the counsel for the defence, upon the qualification of the last juror, remarked that "our client is now in the custody of the Court," and supposed the trial would be proceeded with.

Mr. Harbine, State's Attorney, said the accused would not be out of the privilege of his securities until the finishing of the jury by regularly calling and swearing them.

Mr. Thomas, for the defence, asked if the State intended to complete the jury at this time; and, if not, wanted to know of the counsel for the State if it was designed to raise any preliminary issue previous to going on with the trial.

Mr. Harbine said it was desirable to postpone any further proceedings until to-morrow; as some casualty might intervene and produce a delay. Besides no progress of importance could be made to-night.

Messrs. Thomas, Spencer and Price, for the defence, pressed to know whether the State had any intention of attempting to disqualify any of the jurors, &c. But, Messrs. Harbine, May and Gordon declared that they had no determination on the subject.

The jurors selected were put under charge of the Sheriff, after an earnest, well-directed and appropriate charge as to their duty to the State, the prisoner, and themselves, from Judge Tyson, and the Court adjourned until 9 o'clock to-morrow morning.

SATURDAY, SEPTEMBER 10.

Upon assembling of the Court it was announced that one of the jurors was too unwell to leave his quarters; and another was excused from attending in consequence of having received announcement that his wife was dying.

Mr. Harbine, State's Attorney, said it was his serious duty to move the Court to displace one of the jurors in the box. He did so from information received since he had been put upon his *voir dire*, and read authorities to show the power of the Court to exercise its "sound discretion" in the premises, to set aside a juror, though sworn, at any time before the panel was regularly called, the prisoner arraigned, the charge read, &c.

Mr. Price said counsel for the State had acted fair in notifying him and colleagues for the defence. He objected, however, to the proceeding.

Mr. Pearre, for defence, reviewed the authorities referred to, and cited others in opposition.

Mr. Gordon, for the State, responded, and advocated the right of the Judge to exercise a sound discretion in executing the power prayed.

Mr. Price said there were two modes of trial, viz : First, by putting the party upon his *voir dire* ; and secondly, by triors ; and that the reason of the thing justified the law in the case. Referred to Wharton, 861 ; Pickering, 254. Had understood the juror, (Eichelberger) respectable and intelligent, and therefore had taken him. The time for testing him before triors had past ; that could only be done before he was sworn. He recited the formula of interrogatories framed by the State's counsel, and propounded by the Court, to show that the juror had been fairly chosen. The State could not show him perjured. To one of the interrogatories the juror said he had expressed opinions ; but in answer to another, he declared he had not deliberately formed opinions, nor had he any fixed ones ; and again, to another question, he had said, that nothing he had heard, said or read, would prevent his giving a fair and impartial verdict according to the evidence and law. How then could proof be adduced to show his mind false. It was a matter between his God and himself. Though anxious to proceed with the trial, he felt bound to speak in defence of the juror.

Mr. Spencer, on part of the defence, thought there need be no doubt but that the juror implicated could show a clear conscience. The motion involved a high charge against him, and therefore counsel defended him. He referred to authorities quoted, and gave others in opposition.

Mr. May, on the part of the State, said the motion was based upon the principle of a just administration of the common law, and no course of opposing counsel should prevent the exercise of what was conceived a solemn duty to the State and to justice. He denied that this procedure was designed, or would be so regarded, as intended to impeach the integrity of the juror. Certain information as to what the juror had said formed grounds for investigation, which, if established by witnesses, would prove his inability to set upon the case. A question of partiality goes not only to the prisoner but to the State. Suppose he had said he had not formed or expressed an opinion, and evidence could be produced that he had forgotten many of his expressions in the past, would it not be competent to give the fact in sustaining the motion, and to show he had indulged in prejudices ? As to his entertaining

a decided opinion, the court and the juror may differ as to their understanding of that expression when further elucidated ; and, as it is fair to presume that the court is the better judge of the legal meaning of that term, it will readily be supposed that the court should inquire into and decide the matter ; and yet the juror had no right to suppose it was an effort to impeach him of false swearing. If the facts expected to be proven should be done, and if it should be found that the Court had no power to remedy the matter, it would cast a shadow over the judicial machinery of Maryland, which he would blush to acknowledge.

The position assumed, he regarded as fair, open and just. What happens to work for one side to-day, might be found to operate in favor of the other to-morrow. He argued in favor of the Judge's taking the matter up, and of deciding upon principles of reason, justice and law. He cited various authorities, for the positions he assumed, in a lengthy argument, to show the power and the duty of the Judge, to purge the jury-box of any improper person.

Mr. Pearre, for the defence, argued that their position was shielded by the common law of the land.

Mr. Harbine replied to opposing counsel. This concluded the argument.

The Court, having met at 9, took a recess from about 1 to 4 o'clock.

The Court re-assembled, when Judge Tyson responded to the motion to set aside the juror, by the delivery of the following opinion :

"The juror in question having made himself *prima facie* competent by having been sworn upon his *voir dire*, and having been immediately sworn as a juror in this cause, does the fact of his having been sworn as a juror make him absolutely competent, or may the fact of his competency under any circumstances be enquired into by this Court. That he was sworn upon his *voir dire* affords not the slightest reason why an investigation into the truth of his deposition should not be had. The doctrine applicable to the *voir dire* where it is used as a test of interest in a civil cause, has no reference or analogy to a case like this ; the technical term is the same, but in the civil case other imperious rules and principles of law come in, all enforcing the conclusiveness of the answer of the witness. He is the witness of the party who examines him upon his *voir dire*, his credibility is admitted, and the law will not therefore, allow him to be impeached. But a juror upon his *voir dire* is not the deponent or witness of any party ; he is the deponent of the Court, and nothing that he may say, is binding upon the State or the accused.

"But a decisive argument against the conclusiveness of the *voir dire* in this case is derived from the fact, that even after an examination upon the *voir dire* and before the swearing in of the juror, either party may challenge him for favor. It seems to be conceded upon both sides, that after the juror is sworn it is too late to examine him by triors, and the question is asked, whether there exists a power in the land strong enough to enquire into the qualifications of a juror, notwithstanding his two-fold oath.

"It is alleged on the one hand, that such power belongs to the Court to be exercised according to its sound discretion; on the other hand, it is said that the exercise of all such powers is precluded by the swearing of the juror. I have never considered that the right to challenge, either peremptorily or for favor, interfered in any degree with the reserved power of the Court to act in any case which a challenge could not reach, or to which a challenge had not (from some cause or other) been applied. In a matter of so much importance as that of the pure administration of justice, it would be very extraordinary if there was not some power in the Court strong enough before trial, to purge the jury box when it manifestly appeared that it was corrupt.

"The objections of the counsel for the prisoner being solely on legal grounds, they concede the facts alleged by the State; they admit for the purpose of the argument that the juror in question is wholly incompetent and unworthy to act in this cause. Such being the case—a juror about to be introduced into an important cause, as an arbiter of life and death, who is wholly unfit for the sacred office, who might degrade and prostitute it, it is of immense importance to be able to ascertain whether there is any power in the land, strong enough to reject him. I think such power exists in this Court. If the Court has not the power under such circumstances to preserve the incorruptible purity of the jury box, if it can with its eyes open see a juror walk into its sacred enclosure, with the avowed intention to defeat the ends of justice, then justice is a mockery and Courts and juries are but idle pageants for the amusement of the multitude. The Court, therefore, grants the motion made on the part of the State."

Gov. Thomas suggested, that from the language contained in the opinion of the Court, the public might suppose that the counsel for the prisoner admitted *in fact*, that the individual whose admission was in question, was really unfit for a juror, and he wished to say to the Court, that such was by no means, the opinion of the counsel.

The Court replied, that the statement was made in its opinion, upon the general ground that, when counsel raised this

question of law in relation to the power of the Court in this case, the facts stated by the counsel for the State were necessarily admitted for the sake of argument. It was like a Demurrer to a Declaration—where the facts are assumed to be as stated, and where the decision of the Court is to be made upon such assumption.

Mr. Price asked the Court to make its decision part of the record in the case; which was assented to.

Mr. Thomas, on behalf of the defence, said we have a similar motion as that of the State to make, in reference to another juror.

Judge Tyson made some enquiry as to counsel for the juror.

Mr. Thomas said it would involve counsel for the accused in an indelicate position to appear in defence of the juror, as among other things it might lead to the impression that they were anxious to procure a juror alleged to have partialities for him, &c., and thus operate to the prejudice of their client. He concluded by saying he might have been hasty in mentioning a design of motive in regard to another juror.

Mr. Price said such a case had never occurred within the range of his knowledge, in Maryland, and as counsel for the accused, it was proper to decline acting for the juror in his present position. But, after further remarks from counsel, Mr. P. said he would act as counsel, without fee, if the Court would release him from the jury box, so that he might come to the counsel bench.

Mr. Spencer made some suggestions, to which the Court acquiesced.

The juror asked Mr. Price to act for him, to which he responded, and selected Samuel M. Semmes, of Allegany, to aid him. The witnesses for the motion were called, when the arraigned juror asked permission to go out to find proof for his defence. This led to some discussion, of no material importance.

Upon the suggestion of counsel, the motion to the Court was here submitted in writing as follows :

“ In this case, after the jury were sworn, and before the jurors were counted or the indictment read to the prisoner, and after the jurors were sworn upon their *voir dire*, and answered the questions propounded to them by the Court, by consent of both parties as to their competency, the said questions having been submitted by the counsel for the State, and agreed to by the counsel for the prisoner, the State, by its counsel, prays the Court to set aside and remove from the jury, Peter Eichelberger, a juror sworn in this case, because he has formed and expressed a decided opinion against the said State, and manifested preju-

dice and a deep feeling of bias in favor of the prisoner at the bar—the same having come to the knowledge of the counsel for the said State since the said juror was sworn in this case.”

(Signed,)

THOMAS HARBINE,
Attorney for the State.

The following was thereupon also submitted :

“The counsel for the prisoner object to the withdrawal of the juror, because the juror had been examined on his *voir dire* as to his impartiality, and as to his expressing opinions as to the guilt or innocence of the prisoner at the bar, and because there was no power in the Court to order a juror to be withdrawn after he was sworn, without the consent of the prisoner.”

(Signed,)

GEO. A. PEARRE,
Counsel for Prisoner.

Witnesses were then summoned and examined as to the competency of the juror.

Robert Curtis.—Had a conversation with Eichelberger on several occasions on the subject of the present trial; did not charge his mind with Eichelberger's words; the most he can recollect is of Tuesday night last, when E. expressed himself freely; said that Swan was justifiable in shooting Sprigg; he (E.) would have done as Swan did five years after he accepted the apology; the conversation lasted ten or fifteen minutes; E. was excited; excited by the discussion; was not excited when the discussion commenced; witness had said he thought Swan would have been justifiable if he had shot Sprigg at the time he spit in his face. E. did not profess to know all the evidence; witness supposed his mind made up from the representations as they had come to him; on them his mind was made up that Swan was justifiable; his expression was made in a moment of excitement. Witness does not recollect if the conversation was on Monday or Tuesday evening; it was at E's store; thinks other persons were in conversation with him at the time; has heard E. say no one ought to make up his mind before he hears all the evidence; is not certain that he said so on this occasion.

Daniel Giles.—Was present during part of a conversation between Eichelberger and Curtis, on Monday evening; heard E. say, “if a man spit in his face, he'd shoot him if it was five years afterward, even if he had accepted an apology;” did not particularly justify Swan; spoke of the insult if to himself.

James McGonigal.—Thinks it was on Tuesday evening last he was sitting with Eichelberger in front of his store; E. remarked that he had been summoned a talesman and was very sorry; witness said he could easily get off, as no one was taken who had expressed an opinion; E. said he could not, he had never expressed an opinion; had stood out against expressing an opinion, and had cursed Hawthorn for expressing his opinion,

and that he was always opposed to any one expressing opinion on a subject till he had heard all the evidence. Witness lives near E.'s store ; is there almost every day ; don't recollect ever having heard him express an opinion on this subject ; has heard him say he would not make up his mind till he heard the evidence, although he had been to Cumberland and heard that Sprigg was a bully and very overbearing.

George Lorshbaugh.—Never heard Eichelberger express an opinion on the subject ; lives near and is often at his store, but always on business ; was not there on the evening referred to by other witnesses ; has lived neighbor to E. for eight or ten years ; he is a man of veracity.

John Hawthorn.—Heard Eichelberger express opinions on both sides of this case ; it was an old talk at his store, where they read the newspaper rumors about the affair ; sometimes E. said Swan was wrong ; sometimes right ; just as the papers changed ; witness never heard him say his mind was made up.

William Hawthorn.—Had an argument with Eichelberger some time back about this case ; E. said one ought not to express an opinion ; he had not ; witness thought he had, and said so.

William Freaner.—Is often in Eichelberger's store ; had several conversations with E. concerning this case ; he said Swan ought to be tried, and have a fair and impartial trial, and that people ought not to make up their minds till they hear all the evidence ; that there might be contradictory evidence ; this conversation was some six or eight months ago ; the last was within a couple months, but he always held the same language ; his character is good ; is an honest man.

George M. Albert.—Lives near Eichelberger's store ; is often there ; one day Swan passed by and witness alluded to his case ; E. said " hold your tongue ; people oughn't talk so much about it till they know the evidence," witness never heard E. express an opinion as to the guilt or innocence of Swan ; character good.

John M. Hauck.—Has his office near Eichelberger's store ; is often at the store ; has not often conversed on the subject ; has heard E. express opinions both ways ; can't say when ; thinks on Monday last, conversed with E. about it, when he said a man couldn't form an opinion till he heard the evidence of both sides ; he often had said the same ; had always added it when speaking to witness of this affair ; character is as good as any man's.

H. N. Harne.—Is an old acquaintance of Eichelberger ; gets to his store about once a week ; his character is very good ; has heard him speak of this case ; commonly had no opinion ; never expressed any kind of feeling.

James Wason.—Knows Eichelberger ; his character is very good.

The question of competency being submitted, the Court set

aside the juror as incompetent, and ordered a list of forty talesmen, returnable by Monday, at 11 o'clock.

The counsel for defence suggested that they had a similar motion to make with reference to another juror, of which the State were already advised.

Mr. Price asked what would be the position of the defence now, after the discharge of this juror, with reference to the right of challenge? When Mr. E. was sworn, the prisoner had a number of challenges, which were now exhausted, and they claimed the right to stand in the same position they did when this juror was qualified.

The Court reserved his opinion until Monday morning.

Adjourned until 11 o'clock, Monday.

MONDAY, SEPTEMBER 12.

With a view to the despatch of business, the court adopted an order restricting each party to two speeches—the opening counsel to close.

Mr. Price again called the attention of the Court to the fact that when Mr. Eichelberger was sworn, they had four peremptory challenges remaining, and claimed the right of occupying the same position as they did when Mr. E. was set aside. He asked, if the whole list of jurors was set aside, and the challenges exhausted—the whole to be gone over again, the prisoner was to be denied his challenges, as at first.

Mr. Harbine, upon consultation with counsel, said they did not recognise, but were willing to accord the right of the four challenges to the prisoner.

The list of forty talesmen was then called, when the following juror was qualified:—Claggett W. Randall.

Mr Bowers, one of the jurors announced his inability, in consequence of sickness to sit as such upon the trial, and was discharged by consent of counsel.

The selection of another juror being necessary, the list of talesmen was again called, when Thomas Boyd was qualified and sworn.

The witnesses for the State were called and sworn.

Mr. Gordon then made the opening statement for the State, as follows:

GENTLEMEN OF THE JURY :—You are no doubt much relieved by the termination of the tedious proceedings by which your pannel has been filled, and the tribunal completed by which the issue in this cause is to be decided. To some of you these proceedings, or at least some of them, may appear useless and unmeaning; but if you reflect for a moment upon the grave and serious consequences of the result of this inquiry, as it effects the life of the prisoner upon the one hand, and the administration of public justice, by which the peace and well being of society is

to be protected, on the other, you will appreciate the motives of the counsel for the State, and not think lightly of their efforts to secure a fair and impartial jury, as they felt themselves bound to do, acting under a sense of duty; and, I have no doubt, you will extend to the gentlemen on the other side the same indulgence, in the discharge of the duty they owe to their client.

The prisoner is indicted for murder in the first degree; but under that indictment you may find him guilty of either of the degrees of felonious homicide—murder of the first degree, murder of the second degree, or manslaughter. Your verdict though must fix the degree, and it is therefore my duty now to explain to you the law which defines and limits the law of murder and manslaughter.

You will remember however, gentlemen, that nothing that is now said to you, by counsel on either side, is to have any effect upon your verdict. Their statements are not evidence, and your decision must be founded upon the evidence alone as it may be detailed to you by the witnesses.

The opening statements of counsel are for the purpose of informing you of the general nature of the charge and defence, so that you may understand the subject of inquiry and the application to be made of the evidence as you hear it from the witnesses.

Murder, is the unlawful killing of a human being, in the peace of God and the State, with malice aforethought. And the malice may be either express, as when a man makes threats before hand, or at the time of killing, of a deliberate intention to do the act; or implied, as when the killing is with a deadly weapon or without sufficient provocation. Every homicide, too, is presumed to be murder, until the contrary is proved, and the burden of proof is upon the prisoner. Lewis, 354, 390. In every criminal trial of murder, the law first presumes his innocence, but when the killing is proved, the presumption is against the prisoner, and he must show the absence of malice to reduce the offence to manslaughter. This is the law of the case as it existed at common law; but it has been somewhat changed by an Act of Assembly. This Act of Assembly though does not change the law of murder, as it existed before its passage—everything that was murder then is murder now. And its only effect has been to distinguish between the different kinds of murder: those for instance committed with poison, by lying in wait, or in the attempt to commit certain other felonies, mentioned in the Act, or any kind of *wilful, deliberate and premeditated killing*; and murder committed in attempting to do some other unlawful act, and without any intention to kill. To the first class of cases, the penalty of death still remains; but the second class are, according to its provisions, punished by confinement in the penitentiary.

The general language of our statute, under which we expect to convict the prisoner of murder of the first degree, is a literal copy of the Act of Pennsylvania upon this subject. The statutes of New Jersey and Virginia are also in the same language, and as we have no decisions in our State to guide us in the interpretation of the law, I will refer you to the authorities in those States, to show you how they have interpreted their statutes, and you will then find the line which it will be your duty to draw between murder of the first and murder of the second degree clearly defined. The first authority is from Lewis, U. S. Crim. Law, 393, 394 :

“Whenever it appears from the whole evidence, that the crime was at the moment deliberately or intentionally executed, the killing is murder of the first degree.

“In fine, whenever the deliberate intention is to take life, and death ensues, it is murder in the first degree ; whenever it is to do bodily harm or other mischief (without an intention to take life) and death ensues, it is murder of the second degree, while the common-law definition of manslaughter remains unaltered.” —Same authority, page 417, 418, and Wharton’s Amer. Crim. Laws, 428, 432, 3 and 5.

We see then gentleman, that every act of homicide accompanied with malice, is murder, and if it is deliberately intended at the time of the act done, it is murder of the first degree ; if the killing is not intended, it is murder of the second degree.

The next thing in a trial of this kind, is to determine what will reduce the killing to manslaughter. For this purpose there must be a provocation sufficient to destroy the mental capacity of the party and create a momentary madness, during which he could have no control over his passion ; and the act must be done so recently after the provocation that reason could not have time to resume her place in the mind. For no provocation, however great, will reduce the homicide from murder to manslaughter unless it is accompanied with passion, nor will passion without provocation. Lewis Crim. Laws, 396, ’7, ’8, and Wharton, 368.

It is not every provocation either, that is sufficient in law, even when accompanied with passion, to reduce the killing, and therefore, no word of abuse, no indecent and insulting jestures will be sufficient, however much the party may be influenced by them, for the law intends to restrain passion and not to encourage acts of violence by indulging it when unreasonably excited.

It must be so recent too, that a reasonable man would not be likely to have recovered from the transport of his passion and commence to reflect in the interval, for if the passion is kept up an unusual length of time, this will be evidence of malice and the killing will be murder.

The next subject of enquiry is, whether the killing is justifiable or excusable, so as to relieve the party from all punishment. If he would show a justification, the killing must be in accordance with some legal authority, as a Sheriff who executes a prisoner under sentence of death. If it is excusable homicide, he must show that it was done in actual defence of his own, or the life of some of his family, or to prevent some great and immediate bodily harm; and the necessity for killing must be so great that nothing else could prevent it. If he had the means of escaping, the killing is not excusable, and the danger must be so imminent that nothing but the killing will prevent it. Lewis, 998; Wharton, 386, 388.

You will find from the evidence of the witnesses in this cause, that the murder, charged in the indictment, was committed on the 11th February, 1852. About 7 o'clock of the evening of that day, the prisoner, with a friend of his, was in the billiard saloon, opposite to Heffelfinger's Hotel, in Cumberland, engaged in playing a game of billiards. While they were playing, Sprigg, the deceased, came in, walked past them, without saying or doing anything to attract attention, to the back part of the room, where his cousin, William Sprigg, and several other gentlemen were playing billiards on another table. He stood there for ten or fifteen minutes looking at the game, and laughing and talking in his usually sprightly manner with those gentlemen. He then went out of the room into another part of the house. The prisoner kept on playing until his game was ended, then left the billiard room, went across the creek about a quarter of a mile to his office, armed himself with a double barrellled gun, a pair of pistols and a bowie knife; returned to the billiard room, expecting to find Sprigg there; looked in; but he was not there; then went across the street to Heffelfinger's Hotel, where Sprigg boarded, looked through the window, and saw him inside sitting by the stove in conversation with some strangers who were there. He then went in; opened the door quietly; threw it open wide, and instantly raised his gun, took deliberate aim at Sprigg, and fired without saying a word.

When Sprigg saw him raise the gun, he started to run from him, and went to the door leading into the back yard, and the first load which did not prove fatal, lodged in the door. Sprigg then, not being able to escape through that door, ran towards the door of the reading room, and after advancing two or three steps, Swan fired the second barrel, which took effect, and he instantly dropped dead.

After firing the second time, Swan said to the persons, who were strangers there, "gentlemen, I am Robert Swan. I killed Will Sprigg. If any body wants me, I will be at my office." At this time Mr. Callen made his appearance from behind the bar,

and Swan turned to him and said, "Davy, you know me, I killed Will Sprigg. I done it coolly and deliberately."

By this time one of the witnesses had come in and met Swan at the door, asked what was the matter; Swan replied, that he had killed Sprigg. Some one then proposed to go for a physician; another said it was no use, that he was dead. Swan again replied and said, "yes, he is as dead as hell." Somerkamp now came in from the ladies parlor, and asked what was the matter; Swan said, "he had killed Will Sprigg, that he had made up his mind to do it, come there to do it, and had done it with his fowling piece," which he then held on his arm. He also said, that that was not all the arms he had, but had plenty more for any emergency, and then took hold of his coat and threw it open to show his arms. Somerkamp then took a candle off the bar, and went to look at deceased, when Swan said, "oh, you need not look at him, he is dead." Some one then asked where he was shot. Swan replied, "he is shot in the head. I am a good shot and hardly ever miss my aim."

Swan then left Heffelfinger's; went to Cowton's, and there announced the fact in the bar room, and said he had done it coolly and deliberately. He next went on his way towards his office, till he got to the store of Mr. Betts, where a number of persons were standing talking about the matter. When he came up to them he said that he supposed they were talking about it, and said he had killed Sprigg; that he had done it deliberately, and would do it again. Some one then asked how he did the act, and he raised his gun deliberately and showed them how he aimed at his victim, and said he shot him like a partridge, and was better on the wing than sitting; alluding to the attempt of the deceased to escape from him.

The evidence will show further, that the prisoner had made threats towards the deceased, and had said that he would kill him, and afterwards, while in jail, said that he had shot him like a damned dog, and not like a gentleman.

If these facts are proved upon the part of the State, they will make a clear case of murder of the first degree, and it will be for the prisoner to prove such facts and circumstances as will reduce it to a less degree of homicide. If you should be satisfied that the killing was with malice, but without the intent to take life, your verdict should be for murder in the second degree. If it was without malice upon a sufficient and recent provocation, and under the heat of passion, it should be for manslaughter. And this is the lowest degree of homicide to which it can be reduced, unless you are satisfied that Sprigg, at the time of the killing, was actually assaulting Swan, and in such a violate manner that he had no means of saving his own life, but by taking that of his assailant.

I forbear now from making any further statement of the facts to you, believing that the inquiry cannot legally go beyond this extent. If however our friends on the other side should think differently, and the Court should agree with them, we are prepared to meet them on all the points of the case, and defend the general character of the deceased, as well as his conduct in the difficulty which resulted in his death. And, for the present, I will leave the case with you for your calm and patient investigation, after hearing the evidence on both sides.

Mr. Price then made the statement for the defence, as follows :

STATE OF MARYLAND,)

INDICTMENT FOR MURDER.

vs.

ROBERT SWAN. }

September 12th, 1853.

MR. PRICE'S STATEMENT FOR THE DEFENCE.

GENTLEMEN OF THE JURY:—It now becomes my duty to state the case of ROBERT SWAN: but before I take up the facts more immediately connected with the case itself, allow me to call your attention to some of the extraordinary occurrences which have marked the history of this prosecution.

The transaction out of which this indictment grew, arose in Allegany County; the case as you see is tried here. By whom was it brought here? Not by Robert Swan. I desire it to be distinctly understood that he has not fled from the county, in which he was born, where his character was known, as also the character of Wm. O. Sprigg, the deceased—where all the witnesses and all the influences operating upon their minds, were fully known to the community—to take his chances for justice among strangers. It was brought here by the State, and upon the simple oath of the State's Attorney, that the prosecution could not have a fair and impartial trial in the Circuit Court for Allegany County.

There is an ancient and revered maxim, the establishment of which, cost oceans of blood in England, for it was built upon the ruins of the bloody "star chamber," that great engine of oppression in the hands of the Stewarts and the Tudors; a maxim which was transplanted from England into the "Colonies," and which is now found in every State Constitution of the Union—which was a part of the old Constitution of this State, and has been carefully transferred to the new,—which declares, "that the trial of facts where they arise, is one of the greatest securities of the lives, liberties and estate of the people."

Now, what is the reason upon which this great maxim rests? It is this, that every man has a right to be tried by his own vicinage, by those who know him, and know all persons connected with the transaction; and this practice of dragging a man from his own home to be tried among strangers is one of recent growth in the State of Maryland; and I aver that it is wrong in principle and oppressive in practice.

If it be a great security of a man's life or liberty that his case shall be tried in the county where it arises, why is it that this great security is to be swept away by the mere breath of a Pros-

ecuting Attorney? The amount of that officer's oath is nothing more than that the State will have a better chance of conviction where the prisoner is unknown, than where he is known, and this oath no man is to gainsay or deny. The moment it is made the cause is removed, and the accused, is deprived, as a matter of course, of one of the dearest rights guarantied to the citizen by the constitution and the laws.

Again, gentlemen, that same Constitution declares, "that in all criminal prosecutions every man hath a right to a speedy trial by an impartial jury;" This is declared to be every man's *right*, and how has that right been accorded to Robert Swann? He was committed to the jail of Allegany county on the 11th day of February, 1852, and we are here engaged in his trial in September, 1853, after a lapse of nearly nineteen months. Now what is the meaning of the term "speedy trial," or are the words in the Constitution mere verbiage without any meaning at all? An emphatic meaning has been given to this clause of the Constitution by the Act of 1809, which declares in so many words, that he shall be entitled to his trial at the first term after the case arises, and should the State not be ready to try him at the second term, he may, in the discretion of the Court, be discharged. It is every where regarded as rank oppression, that a man under indictment for a criminal offence, shall be kept in suspense and his trial delayed beyond the second term after proceedings have been commenced against him, and where such is the case, the Courts will release him from confinement and set him at liberty.

Now, in this case, the first term of court in Allegany county after this case arose, was that of April, 1852. At that term Robert Swan came from his prison into Court, all his witnesses were in attendance, and he fully prepared for trial. After four days' spent in arraigning the prisoner and swearing two jurors, the State suddenly broke off the trial, fled from the State of public opinion in Allegany county, and dragged the prisoner here to take his chances for justice among strangers, who had never seen his face or heard his name before.

The first term occurring in this county after the removal, was that of November, 1852, and then again Robert Swan appeared with all his witnesses, collected at great cost and labor from the four quarters of the earth, and as had been foretold when the State removed the case to this county, she had no Judge to try the cause, and the cause was continued by the State until March term, 1853, when the accused again appeared, the State being still unprepared for trial. Robert Swan has been ready and the State has been getting ready all the time. Now, is this the speedy trial which the Constitution guaranties to the humblest citizen?

I feel compelled to mention another extraordinary feature belonging to the history of this prosecution. The Governor of the State has taken an open, undisguised and zealous part against the accused. In his message to the Legislature at its last session, he referred to this case by name, in terms well calculated to excite prejudice against the prisoner, and recommended to the Legislature to pass a law for the purpose of strengthening the arm of the prosecution. Now, it is one of the most fundamental and sacred principles of free government, that for any criminal offence, the party charged has a right to be tried by the law as it exists when the case occurs, and every generous and manly sentiment of the human heart rises up in rebellion against any attempt either to make or to amend the law, to effect a case already pending. The Constitution of your State emphatically declares, that retrospective or *ex post facto* laws are "oppressive, unjust and incompatible with liberty." I was amazed that gentlemen of the Legislature, whom I know and highly esteem, could be prevailed upon to give their support, to a law so unjust, not to say tyrannical; but they did more, they introduced a bill to mutilate the ancient and revered institution of trial by jury itself, that Robert Swan might be deprived of those privileges of selecting a jury, which had been enjoyed by every man accused of crime, for centuries before he was born. Gentlemen of the jury, Governors and legislators are subject to the contagion of public prejudice, as well as other men, and when the minds of the whole people of the State were poisoned by the slanders which had been spread broadcast over the land, it was hardly to be expected this men in authority should escape its influence. The cause of that state of public feeling against this youth is easily explained. There is a low, scurrilous, cut-throat, penny-paper, published in the city of Baltimore, the moral worth of which would be dearly estimated at the value of a penny, which has made it a business since the commencement of this unhappy affair, to misrepresent and vilify Robert Swan. While every other paper of any standing in the State has had the self respect to refrain from comment upon a case already committed to the laws, and which must come before a jury for trial, the "Baltimore Sun" has purposely closed its columns against the truth, and thrown them wide open to the admission of calumny upon calumny, and lie upon lie. That sheet, being the only channel through which information could be obtained by the public, in reference to this case, and all its statements being false and fabricated, it was not wonderful that the public mind should be poisoned against this poor boy, and the people of the State be prepared to hunt him down like a beast of prey.

I now proceed to lay before you the facts more immediately connected with the case you have to try. Gentlemen of the jury:

It is always painful to speak of the dead in any other than terms of kindness, but duty to the living requires, that I should refer in distinct terms to some of those unhappy traits of character, by which the late Wm. O. Sprigg was distinguished in the community in which he lived. Of a temper fierce and turbulent, almost beyond example, it seemed to be the business of his life to cherish revengeful feelings against his fellow man, and to seek out occasions for their gratification. It was almost impossible, do what you might to avoid it, to escape a quarrel with him. And whoever quarrelled with Wm. O. Sprigg, must either fight or succumb. If the instincts of peace led you to conciliate him by mild language, it was sure proof to his mind that you were a coward and afraid to fight. In which case he would pursue you, in season and out of season, with the most unmeasured abuse. If nothing were left you but a fight, it must needs be with dirks, pistols or other deadly weapons. I forbear to say more; the testimony will go far beyond what I have said of him.

The very reverse of all this is the character of Robert Swan. Brave generous and kind-hearted, he never harbored a feeling of revenge against a fellow creature in his life. A descendent of General John Swan of the Revolution, as brave a man as any in the Continental Army, the grandson is a worthy scion of the old stock. But gentle and conciliating as he is known to be, there are points beyond which his forbearance will not go. And the evidence will abundantly show, that no matter how much roused and exasperated he may be, one kind word will cancel all offence, and make him as docile as a lamb.

On the evening of Thursday, January 22, 1852, there was a dancing party of the ladies and gentlemen of Cumberland, at the large building which was just then finished, and which is now called the "Revere House." The entertainment passed off most agreeably, and the kindest feeling prevailed, until at a late hour, it happened that Wm. O. Sprigg and Robert Swan, being in the same dance, Swan in a mere spirit of playfulness turned a lady whom it was Sprigg's right to turn. It was nothing at which any gentleman ought to have taken offence, and certainly was not intended to give offence to Mr. Sprigg. But he was not the man to allow anything to pass, which by any ingenuity could be tortured into an incivility towards himself, and seizing Swan by the arm, and pulling him around with violence, he said "what in the hell are you doing here." His conduct was as rude and offensive as it well could be, and those who witnessed it rather wondered how Mr. Swan could submit to be thus treated, and for a moment he did seem disposed to resent it on the spot, but recollecting where he was, he walked up to Sprigg, admitted he was out of his place, and apologised for it.

The moment the dance was over Sprigg left the ball room, passed into the refreshment room on the other side of the passage, where he poured forth a torrent of abuse against Robert Swan. He spoke so loud as to be heard by the ladies in the other room. A gentleman took him aside and asked him what had happened; he replied, "Swan had insulted him, and unless he apologised he would lick him the next day." The gentleman alluded to immediately communicated what he had heard to Swan, who declared that he had apologised twice to Mr. Sprigg and would do so again, but was afraid that Sprigg would insult him, in which case the entertainment would be disgraced by a brawl.

The next day, being Friday, the 23d of January, 1852, passed over, and Swan hearing nothing from Sprigg, supposed the thing was forgotten.

On Saturday, the 24th of January, after Swan had taken his dinner at the "United States Hotel," and was standing on the porch in front of the house, and on the side of the door, in conversation with Mr. Barrell, Mr. Sprigg stepped on the porch, and advancing toward the door as if about to enter, he suddenly stepped opposite where Swan stood, and deliberately spit in his face. It will be in evidence before you, by the admission of Sprigg, that having determined to offer this brutal indignity to Swan, he armed himself for the purpose, with a bowie knife fifteen inches long, which he carried in his bosom; stating that his object was, in offering such an insult, in so public a manner, to compel Swan to resent it, in which case he intended to cut his damned heart out; that he met Swan in the street previously during the day, but declined spitting in his face then, because there was no one with Swan to witness the indignity.

Swan, at the time of this occurrence, was wholly unarmed; but if he had been provided with arms, he was too much astonished and paralyzed by the shock to use them. His first impulse was to send a challenge to Sprigg, but finding no one willing to be the bearer of his message, he started down street in quest of arms, and after some trouble succeeded in borrowing a revolver from a friend. This he loaded and prepared fully for use, and then returned in quest of Sprigg. As he walked up one side of the street he saw Sprigg coming down on the other, and stepping diagonally across the street to meet him, Sprigg entered the office of Dr. Dougherty and shut the door behind him. Swan hurried to the door and found it was locked. Sprigg remained in the office until he found that Swan was gone, then cautiously unlocked the door, stepped into a sleigh which had stopped for him in the street, and drove out of town; and thus it was, that the man, who one hour before, had spit in his face, and was prepared if he resented it to butcher him on the spot, when now

challenged to meet him upon equal terms, took shelter behind the luck and key. It was immediately thereafter, that Robert Swan passed over the bridge to the house of Judge Perry. The relation existing between him and this gentleman it is proper to explain to the jury. The second wife of Robert's father lives with Judge Perry, who married her daughter. This lady is, therefore, the step-mother of Robert Swan, and the mother-in-law of the Judge. She is the only mother Robert ever knew, and has been as kind to him and as watchful over him, as if he were a child of her own. It was natural that Robert Swan should go to her and to the Judge for counsel or for consolation in all his troubles. On the occasion now referred to, he told what had happened to Judge Perry, who was greatly moved by the intelligence, and could not refrain from expressing his indignation in decided terms. A good deal was said before it occurred to him that he held a high and responsible official station, and that it might be his duty to arrest the parties, in which case Robert Swan must be ruined, as it would at once be said, that he knew before hand that it was the duty of the Judge to arrest him, and had therefore gone to the Judge to make his complaint in order that he might be arrested. You will perceive therefore, that the predicament in which they both were placed was sufficiently trying, and under the circumstances the Judge felt compelled to exact from Robert a solemn promise that he would not compromise him by the use of violence towards Sprigg. The promise was made, there being no help for it, and you will perceive in it an answer to those who have thought, that if Robert had shot Sprigg at the time of the occurrence or immediately thereafter, it would have been all right and proper.

In the evening of the same day, Robert Swan went to the Hotel, and opening the bar-room door, saw that Mr. Sprigg was there, and invited him to come out, that he wanted to speak to him. Sprigg did so, and shut the door after him. Robert then said to him that the indignity was of too gross a character to be borne, that he could not live under it, and he proposed to Sprigg that they should go alone to the stable, both being armed, and there fight it out. To this Sprigg would not agree. Robert next proposed that they should proceed up stairs to No. 5 in the Hotel, lock themselves in, and settle the matter there. Sprigg first objected, that Swann might shoot him on the way up stairs. Swan said no; that if he was afraid of anything of the kind, he would go first, and leading the way, Sprigg followed him.

But for his promise to Judge Perry, Robert might and probable would have taken a different course. It was after sun-down, but light enough remained to see what they were about. When they reached the landing of the stairs, Sprigg requested the other to stop. He spoke of his friendship for John Swan, Robert's

deceased brother, of the friendly relations always existing between their families, referred to the insult he had offered Robert, and expressed his willingness to apologise. According to his own declarations he was so much affected that the tears came into his eyes. Robert's nature here showed itself again; a kind word would always disarm him. He turned around, and the two young men sat down together upon the steps above the platform, and talked the matter over. Sprigg in speaking of the affair afterwards, said he was afraid he would shoot him in going up stairs, and made the damn son-of-a-bitch go first; that he had no intention of fighting him in that way, but that what he wanted was a fight with knives, that he might cut his damned heart out.

The same evening Robert, in consultation with some of his friends, determined that the apology as Sprigg had proposed it, and which it was understood contained some condition, was not such as he could accept. And upon the suggestion of a gentleman, in whose opinion he had confidence, he determined to follow the example of Pleasants and Ritchie, at Richmond. He accordingly penned an invitation to Mr. Sprigg to meet him in Perry's meadows, opposite Cumberland, in Virginia, each armed as he might think proper, the survivor to take care of the slain.

He could prevail on no one to be the bearer of this note, as no one was willing to incur the penalty. It was written on Sunday, the 25th of January, 1852, although it erroneously bears date the 24th of January, 1852. It was left at the Hotel in a box where he knew Sprigg would receive it, and appointed the meeting for Monday, the 26th of January, 1852, at 11 o'clock, A. M. That Sprigg received this communication we know from other evidence as well as from his own declaration.

Before the hour appointed, Swan, having armed himself with a brace of pistols and a double barrel gun, repaired to the place of meeting, but Sprigg did not come, as he declared to others he had no intention of meeting Swan with shooting irons, but when he fought him it must be with knives, and then he would quarter him. To show how differently Swan felt, towards *him*, it will be in evidence before you, that before departing to the place of meeting, he declared it as his purpose, to receive Mr. Sprigg's fire, and then fire his own barrels in the air. At the same time, he left directions with his friend, what disposition he should make of his watch, and some other little articles, in case he did not return.

When Swan returned from Virginia, not having obtained the expected meeting, he was in deep distress, and complained that he could find no friend to advise or assist him in bringing the matter to any conclusion. At length, Dr. Scolley asked him what he desired to be done. Swan said he would be most gratified if the matter could be amicably settled, and Dr. Scolley

then agreed to take it in hand, and ascertain if the affair could be brought to such a conclusion. He sought out Dr. Dougherty with whose assistance, after some little search, they saw Mr. Sprigg.

Dr. Scolley said to him that he came at the request of Mr. Swan to know what he was willing to do. He said, moreover, that Swan would accept an apology, provided it were an ample one. The Doctor suggested, that as the indignity was of the grossest character, the apology must be full and unconditional. Sprigg assented to what he said, and declared his willingness to make an apology. It was then proposed, probably by Dr. Dougherty, that Sprigg himself should write such an apology as he was willing to sign. Sprigg did so; the paper was taken to Robert Swan, who promptly refused to accept it. Doctors Dougherty and Scolley were present, by one of whom Mr. Swan was requested to pen such a paper as he would deem satisfactory. He did so. The paper was taken to Mr. Sprigg by both of the gentlemen named, and he refused to put his name to it. These gentlemen, acting as the friends of the respective parties, agreed to refer the matter to Samuel M. Semmes, Esq., and to get him to draft such a paper as he might deem suitable to the occasion. It was accordingly done. The paper so drawn was first submitted to Mr. Swan, to whom it was acceptable, and then presented to Sprigg who refused to sign it. Dr. Dougherty was stating to Dr. Scolley, in the presence of Swan, the portion of the paper as drawn by Mr. Semmes to which Sprigg objected, and while he was speaking, Swan rose from his chair, and taking out his watch, with great emphasis said, "Dr. Dougherty, *that* paper must be signed by Mr. Sprigg in one hour from this time," and then resumed his seat. Within the hour the paper was brought to Mr. Swan with Sprigg's name to it.

Swan was most unaffectedly and sincerely rejoiced at the settlement of the affair. His countenance brightened up, a mountain seemed to be removed from his spirits. He called upon his friends; told them what had occurred, and expressed his pleasure at it. He carried it to Judge Perry; showed him the paper, but was greatly mortified and distressed that it did not impress the Judge as an accommodation which a man of honor ought to accept. He criticized some portion of the apology, and regretted that it had not been omitted. Robert, mortified and disappointed at this opinion of his friend, burst into tears and asked the Judge to point out wherein he had shewn himself a coward. The Judge endeavored to calm him, and at Swann's request, they set out to see Dr. Scolley, who will say to you, that when they reached his office Robert was

still in tears. It appeared from the Doctor's explanations that the clause which Sprigg had objected to, but which Swan determined should be retained, was the very clause the Judge condemned, and finding this to be the case, the Judge declared himself satisfied, and the advice he gave to Robert was to abide by what had been done, as a final and honorable adjustment of the dispute.

Things remained in that condition for a week, and on Tuesday, the 3d of February, 1852, Swan being advised by his friends, that as the indignity was public, the atonement for it should be so also, published the apology in the form of a hand bill. There was, however, a note appended to it, which stated that the apology had been given in consequence of Swan's invitation to Sprigg to meet him in Virginia. And as both Sprigg and his friends have condemned this note, as the renewal of a quarrel which had been settled, it is proper to say, that Mr. Sprigg did not wait for this publication to re-commence his abuse of Swan, and that the allegation that he did so, was all a sham. On the day he signed that paper, on the day following, on every day, before and after the publication, he was heard denouncing Swan in oyster houses, in bar-rooms, on the streets, in every company and to every one who would listen to him, as a coward, who was afraid to shoot a chicken. He declared that the acceptance of an apology for such an insult was proof of his cowardice. Several persons attempted to check and warn him that Swan was no coward. And one or two persons said to him, "Sprigg, Swan is no coward, and as sure as you live, if you continue to speak of him in this way, he will shoot you." But he would neither be advised nor controlled, and continued to denounce Swan in terms more unmeasured than before.

Robert Swan left Cumberland on the 3d of February for Hagerstown, with a mind ill at ease, for he had heard of the language which the other was in the habit of using about him. While in Hagerstown, it was remarked that he appeared to be uneasy; his cheerfulness was gone, and he moved about from place to place, discontented and unhappy, and returned to Cumberland on Saturday, the 7th of February. In the evening after his arrival, he wrote a letter to an intimate female friend in Hagerstown, stating that he had received sure information that Sprigg intended to shoot him; that Sprigg was greatly provoked at the publication of his apology, and the letter concluded by informing her where she would find a certain paper in the event of his sudden death. He wrote also to Judge Perry, then in Hagerstown, communicating to him the information that Sprigg had threatened to shoot him, and only wanted the opportunity to do so. The last letter he wrote

was to Sprigg himself. It was like all his other acts, a message of peace. It explained to the man of violence why the apology was published, and concluded by saying that when they met, if it was upon friendly terms, he would explain more fully the reasons of his conduct. Putting the letter in the post office, he sent word to Sprigg that it was there, with the request that he should get it and read it. The overture was repelled with scorn and abusive language.

The next evening, which was that of Sunday, the 8th of February, Swan opened the bar-room door of the hotel, and seeing Sprigg there, said to him, "come out Will, I want to speak to you." The reply was a torrent of coarse and violent abuse. Swan shut the door and went into another room. "Now," said Sprigg to those who were in the bar-room, "you see he is a damned coward." Sprigg became loud and fierce in his abuse. The bar-keeper endeavored to still him, but it only made him worse. The bar-keeper then went to Swan, and begged him to leave the house, to prevent blood shed which he was fearful would ensue. Swan said "no, I shall stay where I am, and will act on the defensive. If there is a fight, I would rather be slain than take the life of Mr. Sprigg." His whole power of conciliation was now exhausted; he could do no more to appease his persecutor. He went into the bar-room, passed by Sprigg, heard his abusive language, for he never feared him or mortal man, got a cigar at the bar, lighted it, and again calmly walked out of the room.

Monday the 9th came, and the fact was communicated to Swan that Sprigg was preparing to put out a publication; but he had no certain information of what the publication was to be until Tuesday the 10th, when a messenger from Sprigg informed him, that he would be denounced as a liar and a coward, with the additional aggravation, that it would be sent to his lady love in Hagerstown, to disgrace him even in her eyes.—Swan remarked, and it was the strongest expression he ever used in connection with Sprigg's name—"This man will drive me to desperation."

Gentlemen of the Jury, we have now reached the last, the fatal day, the 11th of Feb., 1852. I ask your particular attention to the events of it in their regular succession. In the morning, about 9 o'clock, Swan went to the office of Mr. Roman. Deeply dejected, he took a seat and never moved from it, nor opened his lips until 1 o'clock, when seeing Mr. Roman about to leave the room, he arose and said that he had received certain intelligence that Sprigg's threatened publication was in the hands of the printer, and would appear the next morning. He then requested Mr. Roman to prepare a deed of trust for him to execute, conveying all his property to Roman as trustee,

who in case anything happened to him, might sell it and pay his debts. Roman put him off and declined doing as he wished. During the day he received a warning from a friend to be on his guard, as Sprigg had expressed his determination to take his life.

In the evening Swan was at the billiard room playing a game with a friend. For it was a notion he had taken up, that while out in the world, no matter what his mental perturbation might be, it was not becoming in him to show it. And at times when he would lie a whole day in his mother's chamber, speaking to no one, noticing no one, and sighing as if his heart would break; when he went into the street he would key himself up, and affect the appearance of the most entire unconcern.

While at the billiard table, Sprigg came in the room, squared himself—set his arms a-kimbo, and stared in Swan's face for fifteen minutes in the most offensive and bullying manner. It affected Swan's play and attracted the attention of the keeper of the table. It will be in evidence to you, gentlemen, that about half an hour before, Sprigg declared to a friend, that his mind was made up, if ever Swan spoke to him he would take his knife and cut his d—d heart out. And here you will find him endeavoring to provoke Swan to say something to him, that he might carry his awful threat into execution.

Swan finished his game, put on his great coat, and leaving Sprigg still in the billiard room, walked to his office, a distance of a quarter of a mile, took down his gun, which contained the charges he had put in it for the meeting in Virginia. He returned immediately to the billiard room, where he expected to find his adversary, and of course expected to find and to fight an armed man. He looked in at the billiard-room door.—Sprigg was not there. He then crossed the street to the hotel, but did not expect to find his adversary in that place, his belief being that Sprigg was at a card table.

We now approach the last scene of the tragedy. With his gun in his left hand he advanced to the bar-room door, put his hand upon the latch and throwing the door wide open, nearly in front of him stood a large, upright stove; behind it was the chimney; with room for persons to sit between the stove and the fire-place. A little to the left of the stove, Sprigg was seated in a chair. Swan advanced three steps into the room, brought his gun up to his eye, and as Sprigg reached a side door leading into the yard, he received a few scattering shot from the first barrel, the principal part of the load lodging in the style of the door. Sprigg relinquished his purpose of escaping through that door, and made for the door of the reading room, about one step from which he received the contents of the second barrel, and fell dead on the floor. All was now

over. On the floor lay what had been Wm. O. Sprigg, the flexed limb, the relaxed muscle, the calm peace of death, in impressive contrast with the scene of violence of the moment before. His spirit with eternity, as much as those beyond the flood, and Swan standing in the smoke of his own gun which he still grasped, the most miserable man among the living.

It is proper here to say, that when Swan entered that door, it was with the expectation of having a contest with an armed man, without the slightest reason to consider his own chances of escape better than Sprigg's. Behind that stove, which Sprigg might have reached in a single step from the chair he occupied, with a revolver in his hand, Sprigg could have fired shot after shot with fatal precision. All it required was nerve and coolness; while his own person would have been securely protected by the interposition of an iron bulwark nearly as high as his head. Again, by throwing up his chair as a protection to his head and vital parts, and then running into the other, he could have realized the desire so often expressed by him of cutting Swan's heart out. Providence designed it to be otherwise, and Sprigg by taking to flight threw away all chance of escape.

There is however, gentlemen, connected with this part of the case, another important fact, to which I beg your particular attention. When Swan raised his weapon against the life of his adversary, the issue of life and death was made, and there was no retreating from it, and the escape of Sprigg through the door, would have left Swan in a room as light as day, the lamps blazing all around him, exposed to the fire of his enemy, who would have been concealed by the darkness without, and in perfect security. It was fortunate that he had two barrels. The first having missed, his life depended upon the other taking effect. The statement which, originating in the polluted source to which I have alluded, has gone the rounds of the public press, that Swan deliberately sought out an unarmed man and shot him down, is a sheer fabrication.

Gentlemen, it will be abundantly in proof to you, that from the beginning of this unhappy affair to its close, Robert Swan never uttered one discourteous expression towards Sprigg; that he strove earnestly to get out of the quarrel upon any terms which could be deemed satisfactory among respectable people; that he never could either find or make the occasion of such an escape, but was forced from one degree of mortification and distress to another, until finally driven to desperation. You will be surprised at the deep and deadly rancor manifested throughout by Sprigg; it was so fierce as to appear unnatural. There is however an explanation for even this.

Sprigg had a kept mistress and it was one of his fancies to believe that Swan had interfered with him; and the girl her-

self, who was in fact, common to the whole town, finding that a feeling of jealousy was rising up in the mind of Sprigg, took advantage of it to tease and worry him about Swan; and thus it was, that a spirit of hostility had grown up in the breast of Sprigg, of the existence of which Swan was wholly ignorant. It will be in evidence by the declarations of Sprigg, that the occurrence at the ball was not the cause of his quarrel with the accused, but that it was an old grudge.

I have not drawn a fancy sketch of the case of Swan. The whole of it will be proved to you by evidence so abundant that you shall not doubt a word I have said.

TUESDAY, SEPTEMBER 13.

The case was continued, when the examination of witnesses was commenced on the part of the State.

Dr. Charles H. Orr.—Testified that he made an examination of the body of Wm. O. Sprigg, at the hotel where he was shot, and found a fatal wound in the neck, near the spine, at the base of the skull, passing through and piercing the socket of the right eye. The wound was caused by shot enveloped in a wire cartridge, causing instant death. Size of wound, about an inch external in diameter, and about six and a half inches depth. There were slight wounds upon the right shoulder and cheek; those on the cheek passed through and cut the tongue. These seemed to be stragling shot, of the first fire, and would not have proved fatal. Assisted in stripping him. Rather think there were no arms about his person; but did'nt examine with that view.

By defence.—No great coat on. The kind of cartridge used are preferred by sportsmen in shooting a long distance; in close encounter they are as deadly as bullets. Did'nt examine his pockets; knew nothing of his being armed.

By State.—The charge used more likely to scatter and produce greater amount of inflation; yet not more likely to miss than a ball. The fatal cartridge, enveloped in hair and clotted matter, was exhibited by the witness.

George Cromwell.—Knew Sprigg; was in the hotel when the killing took place; deceased was sitting beside a stove, about thirty feet from the door which the prisoner entered; prisoner had a double barrelled gun in his left hand; as he raised it, after stepping about two or three paces in the room, and whilst Sprigg was trying to escape through a door near, leading to the back yard, Swan fired at him, but missed. The deceased then ran to get out of a door on the other side of the room from the prisoner leading into the reading room, and as he neared it Swan fired again, when Sprigg fell, and died instantly. The prisoner thereupon turned around, and said to those present, that his name was Robert Swan, of Allegany, and said he had done the deed. The

prisoner then seemed cool and deliberate. Sprigg fell just inside the door. The bar-keeper came from behind the counter, when Swan said, "Davy, I killed that man, and if any body enquires for me, tell them they can find me at my office." Sprigg didn't move a muscle after he fell. It was just after dark; at Heflinger's hotel, Cumberland, Maryland. Saw no arms about Sprigg's body.

By defence.—Deceased could not as easily have reached Swan as the door. Sprigg was attempting to open the back door when the first barrel was discharged at him. Don't think deceased could have seized the gun before discharged. Thinks the stove would not have screened him.

By the State—Thinks they were about thirty or thirty-five feet apart at the first fire; Swan opened the door quickly when he entered; didn't hear it open; didn't see Swan before he entered the room; he need not have gone towards Swan to have got behind the stove.

David Callan.—Resided in the hotel; was behind the bar; on coming forward Swan told him he had killed Sprigg, and so to tell all who inquired about the matter; said he wanted to give himself up, and asked witness to go for an officer; knew of no arms about the deceased; Swan said he wished it expressly understood that he had done the act coolly and deliberately. Remarked that some one should go for doctor. Swan said, "No use to go for a doctor, he is dead enough." Sprigg had just come out from supper, and was talking to Mr. Haskett. Heard door open with violence; heard report of gun. Saw nothing until Swan spoke on account of the smoke. Saw Sprigg nearly every day, and was intimate; he had no arms about him as witness knew of. Did not examine body that night; was not present when it was done. Sprigg was sitting about twenty feet from the door by which Swan entered.

By Juror—Heard no word spoken by Swan or Sprigg at the time of the killing.

George Anderson.—Was in the neighborhood; heard guns fired, and went over; saw Swan, who said, "I've killed Will Sprigg; there he lays;" Swan was anxious to give himself up. Swan went down to Cowton's, where witness also went. When witness remarked that Sprigg was dead, Swan said he "shot him as dead as h—l!" (so witness understood him to say.) Swan's manner seemed to be very cool; spoke in a mild manner; did not seem to be enraged; spoke to witness as he generally did. Knew Swan very well; saw him almost every day when in town.

C. I. Stewart.—Resident of Baltimore; was at the hotel hanging bells; was sitting in the reading-room, with face toward the bar-room door; heard the firing; saw Sprigg fall; prisoner said he had done the deed, and asked witness to take him into cus-

today; thinks Swan was calm, or at least not more agitated than he was, and no man could have been more unnerved; Swan continued for some time walking the floor and asking to be arrested; said he came there to shoot Will Sprigg, and that his name was Bob Swan.

Edward T. Summercamp.—Was in the parlor of the hotel; heard firing; went into bar-room, asked bar keeper what was the matter; Swan replied, "I killed Sprigg." Took candle from bar and went to examine the body; went back to the bar where Swan was standing, and inquired, "Why did you do this?" Swan replied, "Because I am justifiable, and came for that purpose. I don't deny it; I was as cool and collected as I ever was in my life," and walked from there to the door, when some one spoke of sending for an officer; Swan said, "that's right, send for a Judge, a Sheriff, Constable, or whom you choose—I am here." While prisoner was walking about the room, persons gathered around the body of deceased and inquired where he was shot. Swan replied, "in the head—I am a good shot and hardly ever miss my aim." Some one spoke to him, and he said, "This is not all I have got; I have plenty more in case of any emergency." His manner was perfectly cool. Examined Sprigg's body, thinks he had no arms.

Denton J. Brown.—Was on jury of inquest; thinks there was no arms about the corpse.

John Gephart.—Was in front of the hotel and heard the first gun; didn't see prisoner looking through the windows previously; went in upon second report; heard Swan say he had shot Sprigg.

Daniel L. Grove.—Had been sitting with deceased at the stove, just before he was shot. A person came to Cowton's tavern, and said he had killed Will Sprigg; can't say the prisoner is the person; don't know prisoner. The person alluded to had a double-barrel gun.

J. W. Stonebraker.—Had seen prisoner in the hotel; he gave no manifestations of feeling; he was sitting talking; saw the corpse; don't know about the inquest.

J. H. Seymour.—Had called at Swan's office a day or two previous to the affair; was then told of his troubles, and prisoner said one or the other would have to die. Swan wanted to know whether Sprigg's brother (Randolph) was offended at him. Had but one conversation with prisoner, in the course of which he said that he expected one or the other would have to die, meaning deceased or himself. Prisoner wished witness to see Randolph Sprigg and find out whether he was offended, and was very sorry on account of the friendship existing between them. Said he was on friendly terms with old Mr. Sprigg, and other members of the family. The Court then adjourned.

At 3 o'clock the examination of witnesses was resumed.

H. J. McManee.—Saw prisoner on the night of the killing ; was standing in front of Mr. Betts' store, which is some distance from the hotel ; prisoner came along, and said, "I have shot him," and added, "I am better on the wing than sitting; (or standing) I shot him as dead as a partridge." Betts invited prisoner into the store, but he declined, saying he must go and tell his mother. Witness then went to Heffelfinger's hotel; deceased was lying on the floor; it was before the jury was there; thinks deceased was lying at the corner of the door, on his left side; witness did not see him examined, nor examine him himself; saw no arms about him.

Dr. Moore.—Was in the jail while Swan was there; prisoner said to a young gentleman, "tell Davis Richardson that I did all an honorable man could do to have the matter fairly and honorably adjusted," that he was spit on and grossly insulted, and that he shot Sprigg coolly and deliberately, and would do the same thing over again, under the same circumstances; he seemed to regret that he was forced to do it from a sense of honor; he regretted it on account of the friendship that existed between his family and that of deceased; said when he saw a certain paragraph in Dr. Scolley's letter, there was no alternative left; that he shot him not as a gentleman, but as a d—d dog; that Scolley's letter (to be published) prompted him to the act. A young man unknown to witness and a person confined for counterfeiting were present at this conversation.

Cross-examined.—Had never mentioned prisoner's statement to any one till last summer in his store, and afterward to old Mr. Sprigg and Dr. S. Smith; thought it of no importance. Witness wanted Gov. Thomas to come in his house only that he might ask him if he would have to come down to the trial; had a conversation with Judge Perry, and told him he knew nothing of the matter, called on Mr. Roman, at his brother's house, to find out whether he must stay; tried to borrow money of Mr. R., who consented, but subsequently declined. In coming from Martinsburg did not say prisoner was a d—d rascal, and ought to be hung; in coming over witness was in a condition to know what he was doing. His visit to the jail was in the morning, in the latter part of March or first of April; went to see the condition of the jail and the counterfeiter; spoke to prisoner and shook hands with him; don't know of any woman, man or child in the room except the one other person. Witness had no particular reasons for wishing Thomas in his house; spoke to all lawyers on Swan's side; did not negotiate with any one. Did not voluntarily come to the trial; was attached; said nothing else to State's Attorney than to others; begged to get off; motive was to get home; never said deceased was a murderer, etc., never entertained hostile feelings toward deceased.

J. Davis Richardson.—Saw prisoner in jail at Cumberland ; had a conversation with him ; he said he had shot deceased ; never made up his mind to shoot him till that day ; from the facts and circumstances that reached his hearing that day, there was nothing left for him but to kill deceased ; prisoner said he went to his office, got his gun, walked down street, looked into billiard room, went to hotel, did not expect to find deceased there ; expected to find him at a card table ; walked in the passage, put his hand to the latch and pushed the door open, walked several steps into the room, and fired two barrels in succession ; said he passed one person on the street ; it was a dark, damp night ; held his gun up and down his person ; went to billiard room looking for deceased as he had left him there ; said he intended to kill him wherever he found him. Prisoner expressed a great deal of regret that the affair had occurred, as he had the best feelings for the whole family ; Sprigg's sister especially ; he never contemplated any thing of the kind until the day it happened. Mr. Purvey brought a message to witness, but he had forgotten it. Prisoner said he felt confident that he would be honorably acquitted by a jury, as he was justifiable, and that all would be known on the day of trial. Prisoner did not speak harshly of deceased, but kindly of the family and not unkindly of deceased. Witness and prisoner exchanged cartridges often ; can shoot twice as far with shot thus enclosed than otherwise ; a cartridge will pass through the air fifteen or twenty yards without scattering ; not as deadly as a ball, outside of twenty yards ; said his gun contained the same load in one of the barrels that had been there some time. Witness thought a cartridge would be more likely to kill than a ball within a certain distance.

WEDNESDAY, SEPTEMBER 14.

The case was continued. The counsel for the State, after recalling Mr. Brown, for the purpose of showing the distance from Swan's office to where he went to get his gun, and the billiard room, where he had left deceased, and the hotel where he shot him, (some six hundred yards distant,) announced that, in the absence of other witnesses, the testimony on the part of the State, in chief, was concluded.

The witnesses for the defence were then called, and those in attendance sworn.

John Gephart, one of the State's witnesses, was re-called.—Had said that deceased was cool and calm immediately after committing the act. He was walking the floor, with the gun in his hand ; his face was pale ; his hands trembled ; and he seemed agitated—considerably excited.

Geo. W. Clabaugh.—The defence put the following question: "Were you present at the evening entertainment, in Cumberland, on the 22d of January, 1852. [This alluded to the ball at which

Missing Page

it was the design of counsel on the other side to raise the issue as to the right of this Court to decide the question inasmuch as it went to the power of the Court itself. He then went into a succinct history of the practices and rules of evidence as long established. Reviewed the debates in the Convention which framed the present Constitution, to show that it was not designed to change the old system, which he regarded as eminently conservative of justice and incontestibly sustained by the highest authority and every principle of reason and right. He pictured a scene of multiplied inconveniences and perplexities probable to such a position as claimed by the other side, and spoke at length in favor of the right of the Court to decide in the premises. The Court took a recess from 1 to 3 o'clock.

Mr. Price, for the defence, followed, declaring his surprise, that after one side had been heard, through witnesses—the killing proven—in the course of which the defence offered no impediment—it was now gravely moved that his client should not produce evidence of provocation—should not have told his grievances; thus warning the prisoner's counsel that there was a settled purpose to interrupt them at every stage of the investigation. The prosecution, he characterised as unrelenting from its early start.

In reviewing the proceedings of the Convention, and that article of the Constitution, which declares that the "jury shall be the judge of the law and the facts," in criminal cases, he contended that as the terms are general, the application thereof must be general also. He denied that it was calculated to work inconveniences; but intended to set aside mere legal technicalities and to secure justice upon the broad, plain, just principle of right and reason. He made numerous references, and defended that feature of the Constitution under which they based their claim. He thought if the Court should decide that the witness should not be interrogated so as to allow the defence to begin with the first step in the chain of aggravating circumstances which led to so fatal a termination, and they should be thus followed up, the jury would have to render a verdict simply finding the prisoner guilty of the killing, without designating the degree of the crime, and to this point, he read a case, before Justice Buller, in which Lord Erskin was engaged as counsel; and wound up with an appeal to the Court, against perpetrating what he conceived would be a great error, namely, the sustaining of the objection raised by the counsel for the prosecution.

The argument concluded, Judge Tyson said he would give his decision to-morrow, to which time the Court (at 6 o'clock,) adjourned.

THURSDAY, SEPTEMBER 15.

The Court met at 9 o'clock, A. M., and responded to the motion and argument of yesterday.

Judge Tyson delivered the following opinion:

"In the interpretation of a Constitution, or any clause thereof, we should first look to the Constitution itself. Every clause of a Constitution ought to be so plain as to preclude all doubt, when considered by itself, in connection with other clauses, or in relation to the scope and object of the instrument. All previous debates on the formation of the instrument, and every thing *ali unde*, should be excluded from our inquiries, unless the clause is so ambiguous, as of necessity to require them. Otherwise, we virtually make the debates and matter *ali unde* parts of the Constitution. I think the clause in question is too plain to require such adventitious aid.

"If it were not, I have seen nothing in the slightest degree calculated to make it plainer, or to show us the intent of the framers of the Constitution. A proposition is made in convention to incorporate into the Constitution a clause making the jury in criminal cases judges of the law and the fact; an addition is offered to this clause, providing that there shall be a bill of exceptions, and an appeal to the ruling of the Court, as to the admissibility of evidence, the same as in civil cases. The phrase, "the same as in criminal cases," implies that the judge would continue to decide upon the admissibility of evidence, and that his absolute power to control the law of evidence should be curtailed by appeal in addition to the *destruction* of all his power over the law of the case. This addition to the original clause was rejected, leaving the clause itself to stand as it did before, and as it now stands, thus clearly to my mind evincing that the convention would not further control the power of the Court; but would leave them still their old authority of determining absolutely the law of evidence.

"One member, and only one, alledged as a reason why he opposed the amendment that the jury were already absolute judges of the law of evidence, and that the amendment would curtail their power. His opinion of the power of the jury was not sustained by a single member of the convention, but was repudiated by some of the most enlightened of that body; and the remarks of those talented and experienced individuals—all of them distinguished jurists—clearly show that in voting for the original clause, and in voting against the amendment, they desired and intended to keep the law of evidence where it *had* always been—under the control of the Court. The debates, therefore, in the convention, so far from showing an intention in the mind of that body to give to the jury in criminal cases the power of judging of the law of evidence, do in fact show an entirely contrary intention."

"The provision contained in the 5th section, 10th article of the Constitution ever was, and still is, a part of the common law of the land, and was, in the very form in which it there exists, adopted into the Constitution. Gentlemen ask, with earnestness, why was it adopted there, if it was not to give some additional powers to juries?—and as they had not, under the common law the power of judging of the law of evidence in criminal cases, they conclude that that is the power now conferred upon them. Some reason must have operated in this case on the mind of the convention; and as no other is obvious, this must be the reason. But is there no other obvious reason for the adoption of this section. To my mind, the debates and proceedings connected with the introduction of this very clause illustrate the reason Mr. Constable moved the following: 'That the trial by jury, of all issues of fact in civil proceedings in the several courts, &c., where the amount in controversy exceeds the sum of five dollars shall be inviolably preserved.' Mr. Constable said that, 'there was no guaranty in the Constitution for the trial by jury in civil cases.' Mr. Spencer moved to amend the amendment, by adding at the end thereof, the following: 'And in the trial of all criminal cases, the jury shall be the judge of the law as well as of the fact.' Mr. Spencer said that he understood that there had been a recent decision, that the jury were bound by the opinion of the judge in matters of law in criminal cases, &c.

"Here we see at once the very reason why this clause was adopted—it was to guarantee in the Constitution of Maryland the common law right of judging of the law and fact in criminal cases. Mr. Spencer had understood that the right had been invaded, and he wished to put it under constitutional protection. It was mere law and might be legislated away; it was subject to the influence of Courts, and might be trenched upon till it was worn away; the Convention saw that invasion upon it had commenced, and therefore resolved to place it above the reach of time and chance, and clothe it with the imperishability of the Constitution. It does not, therefore, cease to be common law. It still stands upon the ancient records of our rights, but it stands there guarded by the ægis of the Constitution.

"Being thus a part of the common law, and only protected by the Constitution, it stands unchanged, and clothed with the precise meaning which the common law and common understanding of the people had given to it for centuries. That meaning is, that in criminal causes the jury shall judge of the law and facts of the case, but that the court alone shall judge of the law of evidence.

"There is, gentlemen, in my humble apprehension, a distinction between the law of a case and the law of the evidence

of a case. The law of a case—of a criminal case—is the law which enacts the crime and specifies the ingredients which shall enter into its composition. It is specific, and it is necessarily applicable only to that particular case. The law of the evidence of a criminal case is not particularly confined to that case—is general in its character, and applicable to all criminal cases coming within its principle—as applicable to larceny as to murder, to arson as to treason. The *special* law—the law of the case—the jury are, by the common law and the Constitution, presumed to understand. The *general* law—the law of the evidence of the case—they are not presumed to understand no more than they are presumed to know the universal law in all its comprehension.

“I will not attempt reasoning, *ali inconvenientia*, to describe the consequences, certain and probable, which might result from placing this dangerous power in the hands of the juries. I would have to describe Pandora’s box, open and in full and deadly operation throughout the State. In my view, unregulated as it would now be by any law providing for its definite exercise, it would suspend for a time our criminal jurisprudence. That no such law has been enacted, is sure evidence, to my mind, that the enlightened gentlemen who framed our Constitution did not intend to confer this power.

“But even if there were doubts in my mind, on this subject, although I am willing on all occasions to meet responsibility; yet I would deem it presumptuous to adopt an opinion not entertained, as far as I can discover, by a single judge in Maryland. A very able judge, formerly Chief Justice of this State, and while so acting, after the adoption of the Constitution, and before the expiration of his term of service, (I mean the Hon. Thomas B. Dorsey,) had this very subject before him, and after argument, decided expressly that the court only and not the jury, were constitutional judges of the law of evidence. Judge Dorsey was a member of the convention, and the journal of debates shows that he was not only aware of, but participated in, the discussion on the subject of the 5th section of the 10th article of the Constitution. The case to which I allude was the case of the State vs. Stewart, for murder.

“The court, for these reasons, overrule the proposition.”

A question then arose as to the privilege of counsel for the defence or the State, in opening and closing argument before the court as to the admissibility of the evidence proposed to be given, viz: The difficulty between Swan and Sprigg at the ball, alleged to be the origin and starting point in the train of circumstances that led to the killing. There being no general rule, nor special rule of this court, the common practice of the court, as stated by Messrs. Roman, Alvey, Syester, Motter

and others, was adopted, and counsel spoke to the point in the order given below:

Mr. Price said the defence had called a witness to show the commencement of the whole transaction, beginning on the 22d of January, and fatally terminating on the 11th of February, 1852. This was desirable to show a chain of circumstances to take one link of which away, would weaken the force of evidence as a whole. He held this to be essential to the formation of a just judgment of the jury, and a privilege which his client could not be either legally or reasonably deprived of. He referred to the incidents, (as given in his opening address,) to show that the prisoner had been tortured to desperation. He referred to authorities, (Roscoe, p. 22; 1st Starkey, p. 11;) and intimated that a denial of the right claimed, would be a ground for carrying the matter to a higher tribunal.

Mr. Harbine, State's Attorney, said he felt it a duty to interpose against the introduction of testimony which he did not believe pertinent or material to the cause. The mere killing, he regarded the only issue; otherwise a party might so time his actions and give utterance to expressions, as to suit his purpose of defence in a case of killing. (1st Greenleaf, p. 136, sec. 108.) Nothing that took place prior to the day of killing, could be given in mitigation—(1st Russell, p. 113; Wharton, p. 368; Greenleaf, p. 113, 116, 125; 2d Starkey, p. 724.) There being time to cool, antecedent circumstances could avail him nothing—(1st Russell, p. 483; Wharton, 375, 377, 378, 428; Wharton, 125.)

Mr. Thomas, on behalf of the defence, argued the question as coming within the privilege of the jury, and not the Court. He went into a review of the authorities, to show that the evidence proposed to be given was part of the *res-gesta*. Starkey, p. 12; Gill and Johnston, 210. He depicted the cause of the deceased, and in regard to his client, immediately after the killing, said that "he who bravely stormed the batteries of Mexico, wept and blubbered like a boy;" and urged the justness of allowing an opportunity to show that he had committed the act under a frenzied state of mind, growing out of a train of aggravating circumstances.

The Court took a recess from 1 to 3 o'clock. Upon again assembling, Gov. Thomas concluded his arguments.

Mr. Gordon followed in behalf of the position assumed by the State.

Mr. Spencer commenced an argument on the other side, but had not concluded when the Court adjourned.

FRIDAY, SEPTEMBER 16.

There was but little progress made in the trial of this case to-day.

Mr. Wolf, foreman of the jury, was absent, by general consent—a bailiff attending him—in consequence of the death of one of his children.

The argument as to the admissibility of certain testimony was continued.

Mr. Spencer concluded his argument, commenced yesterday. He said it was proposed to prove the occurrence at the ball on the 21st of January, as the beginning of a series of ruffianly and provoking acts and threats, by the deceased, followed up and unintermitted to the time of the catastrophe, which in connection with antecedent acts on that day and immediately preceding the event, justified Swan in believing that he was obliged to kill Sprigg in order to save his own life, and that the killing was not through malice. It was proposed to prove a series of ruffianly and harrassing acts by the deceased, which deprived Swan of his reason, and rendered him irresponsible.

He maintained that the applicability of the testimony was a question for the Court; but it was for the jury to weigh the testimony. He understood the other side in objecting to the testimony, to take ground, that the Court must weigh the whole testimony and ascertain its sufficiency to prove an instigation or justification, before any part should be admitted—to this the defence took issue, and say, such a principle would make the Court heirs of both law and fact, and supersede the powers of the jury, leaving them nothing, but to decide upon the credibility of the witnesses. The effect of the proof he maintained is exclusively for the jury—and ought to be admitted upon the assurance of the counsel of the purpose for which it was offered.

Mr. May, on behalf of the State, spoke at length in opposition to the ground assumed by the other side.

Mr. M. having concluded, the Court took a recess from 1 to 3 o'clock.

The Court having again met, Mr. Pearre, for the defence, spoke until near 6 o'clock; and having concluded, the Court adjourned.

SATURDAY, SEPTEMBER 17.

Court met, when Judge Tyson proceeded to deliver the following decision:

"The State of Maryland, by its witnesses, having made out a *prima facie* case of murder, in the first degree, it is incumbent on the prisoner, if he can, to offer in evidence circumstances of justification, excuse or palliation. For this purpose his counsel have brought to the stand a witness by whom they expect to prove, that on the night of the 22d of January—19 days before the death of the individual alleged to have been murdered—an outrage was committed upon the prisoner by the

deceased; that this outrage was followed by another, and grosser outrage; and that this was followed by a succession of provocations and indignities, up to the very day of the alleged killing. That these outrages and provocations, operating with consecutive and combined force upon the mind of the prisoner, aroused his passions beyond the point of human endurance, dethroned his reason, and led him, in this condition of mental distraction, disorder, to kill the deceased. The object of the defence being to show a succession of provocations up to the period of the catastrophe, it will be unnecessary to inquire into the point raised by the counsel, with regard to the length of time necessary to make any fact a part of the *res gestæ*, or into the question whether the fact to which Mr. Clabaugh is to testify, was or was not too remote to form a part of the transaction. Continuous action, or rather a series of actions, when brought down to the period of the *main* transaction, and connected with it, are tantamount to a single action, or event occurring at the time, and do unquestionably constitute a part of the *res gestæ*. Although composed of separate links, they form one chain.

“ Every case of homicide is a tragedy in real life of one act, and with several,—sometimes *many* scenes. It has its exits and its entrances, its catastrophe and its unity. Its character will be imperfectly understood, if any scene be omitted. These, altogether, constitute the *res gestæ*—the unity of the piece. Whether the catastrophe ends in murder or excusable homicide, is generally illustrated by what goes before, and sometimes by what *follows* the fatal deed. From the statement made by the prisoner’s counsel, it would seem that the first scene in this drama was the affair at the ball room. The spitting in the prisoner’s face was the second; and then followed in order the subsequent events which arose in succession out of that assault. What effect the conduct of the deceased towards the prisoner in these scenes may have had upon *him*—how far they may have operated in law and fact to justify, excuse, or palliate the homicide, or whether they had any such effect, is a matter for the exclusive consideration of the jury. The constitution has, in a most emphatic manner, made them judges of the law and facts of the case, and it is the duty of the Court to guard this power with dragon watch against their own and every other encroachment. I can easily see that the most ready means by which the Court can trench upon this right are through its own power of deciding upon the admissibility of evidence. Under cover of exercising that power, it may take the law of the case out of the hands of the jury; one innovation may lead to another, until at length the whole power may be taken away. I am satisfied that I could not reject the evidence now offered,

without deciding the law of this case, and thus depriving the jury of their constitutional privileges. Under our law of homicide which requires that a killing shall be not only wilful, but deliberate and premeditated, to constitute it murder in the first degree, and which denominates all other murder, murder in the second degree ; a wide door is open for the enquiries of the jury. The character of the accused, his metaphysical nature, his susceptibilities, his temperament, the nature of the provocation, its actual effect upon him, whether he had a reasonable time to cool, or was sufficiently cool to have commanded his actions ; all these may enter into the consideration of the jury. Let it not be understood that, in thus permitting this testimony to go before the jury, that I endorse it—that is, that I pronounce it conclusive for the object for which it is offered, even in supposing the testimony to be in its fullest extent, what the counsel for the prisoner avow it to be. All the Court does, is to permit it to go to the jury, weak or strong as it may be ; when there, it is their constitutional right to judge of it according to law ; it is their moral and religious, as well as constitutional duty, to judge of it according to their oaths.”

The examination of Mr. Clabaugh was commenced, who deposed that he was present at the evening entertainment given in Cumberland, at Mr. Heffelfinger's hotel, on the 23d of January. Late in the evening, whilst dancing perpetual motion, witness standing aside, Sprigg caught Swan violently by the arm, flinging him off, saying “Get out of the way, you are out of your place.” Swan said, “Will, I am wrong, I was out of my place.” Sprigg's manner was very rough ; he gave prisoner a heavy jerk ; prisoner's manner was very humble ; didn't hear Sprigg say anything of prisoner's courage ; can't say what prisoner had previously done ; didn't see prisoner turn the lady ; was not noticing ; it was late in the evening, such time as parties are apt to get excited ; described the dance as quick ; and any interruption unusual, but no necessity for rudeness ; thinks Sprigg must have heard the apology ; deceased, at the time it was given, shook his head, seemingly in anger ; had never said deceased didn't hear the apology ; had told James Sprigg of the matter, who said, “Will didn't hear it ;” am positive I never said he didn't hear ; Swan's lady was then seated ; if my partner had retired I should have done so also ; was surprised at the manner that prisoner received the repulse.

Dr. Charles L. Scolley.—Was present at the ball ; heard a difficulty had occurred ; went to prisoner, who said it had happened in the dance ; that he had apologised to deceased twice ; had communicated to deceased what prisoner had said ; prisoner had apologised twice, and he believed deceased had heard him ; asked prisoner to accompany him to deceased, supposing

deceased might not have heard the apology ; acted voluntarily ; went afterward to the supper room ; took deceased aside, communicated to him the fact of prisoner apologising, and saying he had no ill feeling ; deceased denied that prisoner had apologised ; wanted deceased to go to prisoner ; that he would be a witness to a verbal apology ; Sprigg declined, and said Swan must come to him ; whilst talking, Wm. O. Sprigg, of Michael, his cousin, came up and said to deceased, you are making a fool of yourself ; deceased said he would not allow any relative to make use of any such language to him ; Mr. Sprigg then left them ; deceased uttered oaths ; was much excited, and evidently under the influence of liquor ; he was much more excited after his relative left, and said he would take the first opportunity to insult Swan, either by boxing his ears or spitting in his face ; witness returned to prisoner, found him more excited than previously ; prisoner said he had been informed by a servant, that Sprigg intended to shoot him ; and he had concluded to let matters take their course ; had not communicated to prisoner deceased's threats ; considering they grew out of his excited state ; didn't communicate to prisoner what he had said to deceased.

Wm. B. Barrell.—On the 24th of January, after dinner, was standing with prisoner at the door of the U. S. Hotel, where prisoner takes his meals ; deceased came up the street, crossed over to the porch in front of prisoner and myself ; halted ; deliberately spit with force in prisoner's face ; witness received some of the spray in his own face ; witness asked deceased what he meant ; deceased, turning, waved his hand towards prisoner, satisfying witness it was intended for prisoner ; witness had heard nothing previously of the quarrel ; deceased, a short time after, turned and went away ; witness asked prisoner what it meant, but he didn't say what led to it ; but said, what shall a man do, I am calm and collected ; but he was, really, any thing else ; prisoner further said, " I have but one thing to do." Prisoner did not say what the one thing was, but witness thought he understood him ; about five minutes afterwards, prisoner inquired if he could get any friend to take a challenge. Witness told him no one would carry a challenge.

Cross-examined.—Saw deceased next at Dr. Dougherty's office, about two hours after ; on first going to the door, witness found it locked ; called to Dr. Atkinson, who he supposed was inside ; Sprigg, from the inside, asked " who is there ?" witness informed him ; deceased asked if any body was with him ; he informed him there was not ; was admitted, when deceased again locked the door ; about five or ten minutes after, deceased left in a sleigh ; had told deceased he was safe, and on going out, he looked up and down the street, got into a sleigh and drove

off; witness, Henry R. Atkinson, and two or three others, were in the Doctor's office; don't recollect who was in the sleigh; thinks this was about two hours after the occurrence; deceased said he had understood Swan was armed with a revolver, and that he had been at the door, and that he, deceased, was waiting for a pistol; don't know that he was armed; this all occurred on the same day; when prisoner was spit upon, deceased walked away at his usual gait; didn't stop to answer my question, and walked away so quick, that deceased could not have struck him; was waiting for arms, that he might meet him on fair terms; heard nothing, at that time, of deceased's being armed.

J. Philip Roman.—Met prisoner and Barrell in the afternoon, on the corner of Centre and Baltimore streets; prisoner called him aside; after a few moments' conversation, prisoner passed across the street; and turning, saw deceased coming up the street; witness turned his face aside, in going off, expecting a rencontre. Deceased was outside the office when prisoner went over. This was about 2 o'clock; witness walked to the corner of Baltimore and Liberty streets, when prisoner came over to him; saw nothing of deceased then; had turned his back because he did not wish to be a witness; prisoner joined him again about four buildings off.

Cross-examined.—Knew nothing of the spitting, when he met Barrell and prisoner; had stopped to speak to Barrell, when prisoner called him aside, and said Will Sprigg had spit in his face; witness said, "is it possible." Swan replied, it is; witness said "why didn't you shoot him?" Swan said, "yonder he is now," and passed over in the direction of deceased. Witness then turned his back; prisoner had not said he was going to shoot him; Barrell could not have been far off; when prisoner returned, he said "see that, he locked the door;" and said he wanted to converse with witness, but nothing further took place then; thinks prisoner told him Sprigg had spit in his face, without saying a word; had heard of the ball-room affair before saying, "why don't you shoot him?"

Mr. Barrell, recalled.—Prisoner asked me to cross the street with him, to meet Miss Molly Sprigg, sister to the deceased: when prisoner told her that Will had spit in his face, and there was only one thing left, which he was sorry for, from his respect for her and family; he didn't say what that one thing was.

Cross-examined.—He saw Miss Sprigg home; met prisoner again about half an hour after; corner of Baltimore and Mechanic streets; prisoner said he was going to Dr. Scollay's office; can't say whether he had arms then; had heard him regret not having arms when spit upon.

Henry H. Ainsworth.—Deceased said he was prepared at the

time of spitting, and showed a bowie knife, which he then had; deceased asked witness if he had heard of the difficulty; replied, "yes; you have spit in Swan's face;" told him he should not have done so, that prisoner had been in Mexico; and was a brave man; deceased said that he had given him a chance to show his bravery; that he had insulted a lady, and he would have cut his damned heart out if he had moved his hand when he spit in his face; the knife was the largest size bowie knife.

Cross-examined.—Sprigg said he had seen a friend who advised him to spit in Swan's face.

In chief.—Sprigg at another time, when asked, "Suppose any one should spit in your face, what would you do?" He replied, "I'd like to see any d—d man spit in my face; if I could not shoot him down, I'd strike him any how."

Judge Perry.—Whilst at dinner, prisoner called him out and said, "Will Sprigg has spit in my face;" spoke to him, and alluded to a similar indignity that had been offered our Saviour as the highest insult that could be offered; Mr. Van Lear was there, and said it was not a case of challenge. [After narrating circumstances of Swan's intimacy and connection with the family, his affected manner during his visit at leaving, Judge Perry put him under promise that he would not compromise him as a judicial officer by any disturbance of the peace.] Thinks prisoner did say that evening it would be arranged; had no knowledge of his being armed. Court adjourned.

3 o'clock, P. M.

Mr. Barrell, recalled.—Had conversation with deceased soon after the spitting in his face; said he did not apprehend danger; his object was to get prisoner to challenge him; would then have choice of weapons; would not fight with pistols or rifles, but would choose butcher knives, and would cut him to pieces; deceased said he had been insulted very grossly at the ball.

Arthur Johnston.—Lived at Cowton's hotel; about dusk on the evening of 4th February, was standing with deceased at the door; prisoner came over, and said, "Will, I wish to speak to you;" deceased ran his hand into his side pocket, and walked towards the door; prisoner wanted him to walk on the commons with him; he declined, but afterwards went up stairs to fight it out; as they came down, deceased said it is in the hands of friends—let them settle it; they then separated. Swan boarded at the house. They were up stairs ten or fifteen minutes. On the 8th, was reading a letter to deceased; prisoner came to the door, and said, "Will, I wish to speak to you." Deceased remarked, "clear out, you G—d d—d cowardly, lying son of a b—h; you are one, and I will prove you such to the world." Prisoner turned and went into the dining room. Sprigg said,

"to show he is a d—d coward, let him resent that if he dare." While prisoner was at dinner, deceased was still abusing him. Prisoner was asked how he could stand such abuse; to which he replied, he wished to act on the defensive. Prisoner came into the bar while deceased was cursing him; lit a cigar and passed out. Next day, witness remarked to deceased that prisoner would be apt to challenge him; deceased said if he did, he would have the choice of weapons; witness said he of course would not use any weapon not used in the duellist's code; deceased said he would choose bowie knives, ground as sharp as a razor; would knock him down with his left hand, and carve him up with his right. Deceased came to me before publishing letter in Cumberland paper, saying he intended doing so, stating that he had called Swan a coward, a scoundrel and liar, and wished me to be witness to that fact, the reason for this was, deceased said he did not bear a very good character in Cumberland, and wanted witness to sustain him.

Cross-examined.—Did not say that deceased jumped up, and said, "I know what you are after; I am ready for you," or that Swan threw up his arms and said, "Will, I came for a different purpose." Didn't hear Swan ask deceased what he would do, if he would apologise for his conduct at the ball, or hear deceased say he would make such apology as any gentleman ought to make.

William P. Wood:—Had some conversation with deceased relative to the occurrence; deceased spoke of being called out by Swan to the meadow, and to go up stairs. He said he had made the d—d son of a b—h go before him; he narrated the invitations of Swan to fight it out, and said he proposed settling it by friends, and would make any amends any honorable man could make, but from Swan's continuing the annoyance to his sister and family, and saying he would shoot him, deceased continued his denunciations. While speaking of Swan's cowardice, witness marked to him that he might be mistaken in his man, that Swan had been tried; and he had not. Swan had proved himself a brave man in Mexico, and witness said, "if you cross his path, he'll shoot you, by G—d;" deceased said he had not received the challenge to go to the meadow in time; told Sprigg fighting was like small-pox; after through the first attack it was not so bad; that Swan had been through it, and he had not.

Cross-examined.—Told Swan what deceased had told him; don't know that I told him all—only the substance. Told Swan to be on his guard, that deceased was still threatening him.

Court adjourned.

MONDAY, SEPTEMBER 19.

The Court met; when

Mr. Price proceeded to read the papers which had passed

between Sprigg and Swan. These papers consist of the challenge from Swan, with the note appended—the statement of Sprigg; the letters of Dr. Scollay, Dr. Dougherty and Mr. Semmes. The examination of testimony was then resumed, by the recalling of

Dr. Scollay.—Who testified that his first knowledge of the affair after the ball, was on Saturday, the 24th of January; prisoner and Barrell dined with me at Cowton's; Swan and Barrell had finished dinner and walked out; I joined them shortly after, when Swan said to me, "Sprigg has spit in my face;" I turned to Barrell for explanation, who said he had asked deceased what it meant, when Swan answered that it was intended for him; Swan then said if he could get a friend to carry a challenge, he would challenge him to fight him with rifles at ten paces; didn't see Swan again for fifteen minutes; Swan asked him to go with him into Mr. Triber's store, to get a revolver; saw nothing more of him until late in the evening of that day; I was at Belt's store; Swan came in and took a seat, he said he had just seen Wm. O. Sprigg, had an interview with him; that he called on him; Sprigg drew a revolver; Swan said that was not the proper place to settle the difficulty; Swan then invited him to go either to the stable or No. 5; deceased objected to going up stairs before him, for fear Swan would take advantage of him; Swan disavowed any such intention, and offered to precede him, which he did; he then stated that after they got up stairs Sprigg began protestations of friendship for his brother John Swan; that Sprigg did this with tears in his eyes; that he expressed regret at spitting in Swan's face, and that he believed Swan did not intend to insult him; that deceased had offered to give him a written apology if Swan would say, verbally, that he did not intend to insult him. Swan then asked witness if he did not think deceased had acted cowardly; didn't see Swan until next day, at a late hour of the night; he then informed me that he had challenged Sprigg to meet him at the meadows, in Virginia, at 11 o'clock, and asked me to lend him my pistols; prisoner stated that he intended to go to the ground armed with a double-barrelled gun and pistols; if Sprigg came with pistols only, he would throw aside his gun; that he would endeavor to draw Sprigg's fire, and if he succeeded, would discharge his in the air; that he would do so, not so much on account of Sprigg, as on account of his regard for Sprigg's sister and the family. He took the pistols and left my office—they were the old-fashioned duelling pistols. Next saw him on the day of proposed meeting; came into my office about 10 o'clock, wrote a letter to Captain Archer, requesting him to have it mailed in case of accident to himself; left his watch, seals, &c., with a request as

to their disposition in case of his death; he left shortly before 11 o'clock. About 11 o'clock I had my horse saddled, rode down opposite Perry's meadows; saw Swan sitting on the fence near the orchard; Swan hailed him; about 1 o'clock Swan came to my office; I told him I thought there was some misunderstanding; Swan thought so too; he remarked that he didn't know how to proceed; that deceased had failed to give him satisfaction, &c., and that he had no friend to give him advice. Witness said if he wanted a friend, he was willing to make an effort to bring the matter to some settlement; asked him what he wanted a friend to do; said he wanted some one to go to Sprigg and ascertain what he was willing to do; Swan said he would be satisfied with a full and unequivocal apology. Having learned this, I went in search of deceased; went to Dr. Dougherty's office, and got him to go in search of him; found him, and left Dr. Dougherty with him to explain what I wanted; preceded them to Dr. Dougherty's office, where he was soon joined by them. Told deceased I wanted to see if the matter could not be amicably settled, and it so, to report to prisoner. Then spoke of the insult offered to prisoner as of the grossest and most degrading character; deceased replied that he was well aware of it, and was sorry for it; that he had been advised by A. J. Ogle, of Pa., to box his jaws or spit in his face; regretted prisoner's conduct at ball, as he thought he had acted in a childish manner. Deceased said that on the evening previous he had met Swan; seeing him advance he drew his revolver to meet him; informed prisoner that he had received his note, and told him any man who would write such a note was no better than a midnight robber or assassin; deceased said Swan wanted to withdraw the challenge, and settle the matter between themselves amicably; parted soon after, with no understanding that there was to be a meeting on the meadows; deceased said he refused to give up the challenge; he then turned to Dr. Dougherty, and said he would trust the matter in his hands; he then left the office, saying that he reserved the right of signing or rejecting such apology as we might agree upon; I reserved same right for Swan; Dr. D. drafted an apology, when we proceeded to my office, where we found Swan, and told him we had brought an apology, which I wished him to examine and modify as he thought fit; Swan said it was not such an apology as he would receive; he then drew up an apology himself, which I copied, and handed to Dr. D. to take to deceased; Dr. D. returned it to me on Tuesday morning unsigned; I took the paper and about noon went to the offices of Mr. Van Lear and Mr. Semmes; showed Mr. Semmes the apology; he erased a portion, and substituted another; met Dr. D. afterwards; handed him the

apology, and told him it was modified by Mr. Semmes; desired him to copy it off and get deceased to sign it; Dr. D. entered my office shortly after with the apology unsigned, saying Sprigg objected to a certain clause; prisoner was present; the clause was put in by prisoner, who objected to having it struck out; Dr. Dougherty then wished me to copy it off as modified by Mr. Semmes; that he thought he had influence enough with deceased to get him to sign it. Prisoner remarked in presence of Dr. D. that that apology must be signed, and no other; that unless signed within an hour, he would walk up street, and deceased must defend himself. Dr. D. took the apology to deceased, and returned with it in less than hour, signed, without any alteration. I handed the apology to prisoner and told him to remain as quiet as possible, and bring it out in case of necessity. Prisoner appeared pleased to receive the apology. Some one came in while this occurred, and said deceased was out on the corner, when prisoner went out to him, and extended his hand to him. He afterwards commenced writing to deceased, saying that after receiving the apology he could explain matters with reference to the offence offered at the assembly, which he could not do before. Afterwards Swan came to my office, accompanied by Judge Perry; Swan approached me and said in a whisper, that Judge P. had accused him of acting cowardly. I turned to the Judge and asked him wherein the cowardice was manifested. He took the apology and pointed out the clause which had been objected to by deceased, but which Swan had insisted on retaining. Witness explained this to Judge P. who then expressed himself satisfied. About a week after, prisoner told me he thought of publishing the apology; I advised him not to do so. While Swan was absent at Hagerstown, was advised by deceased that the apology had been published, with a note appended; deceased was very angry, and used very violent threats towards Swan. On Sunday the 8th of February, saw Swan in front of Cowton's hotel; afterwards learned of a difficulty in the bar-room, and asked why he had not resented such language on the spot? his reply was, that seeing Sprigg was angry he had turned upon his heel, and walked into dinner; next morning received a letter from deceased, asking me for a statement of my knowledge of the occurrence between himself and Swan, which I gave; heard of deceased's proposed publication, and told Swan if the publication was of the character it was said to be, he ought to have it arrested; told him I understood deceased was going to publish him as a liar, a scoundrel and a coward; told him there was no alternative but a fight; never heard Swan indulge in violent language towards deceased; spoke of his family in the kindest terms, and said if the controversy went on, deceased

would seal his own fate; Swan spoke at this time rather incoherently; said that his hands were tied, but would not disclose what he meant.

Cross-examined.—Did not understand apology as an answer to Swan's challenge, or dictated by fear; Swan said the note was written in such a hurry that he was not aware of the interpretation likely to be given to it by the public; understood from Swan that the note was not for the purpose of braving deceased, but to show that he had not remained passive under the insult.

John W. McNeille called.—Heard a conversation on the day of Sprigg's death between Sprigg and Kennedy; Kennedy was trying to persuade him not to make the publication in the paper; deceased used very profane language, and said he would publish Swan as a liar and coward, and that he would cut his heart out; Kennedy told deceased if he did, Swan would shoot him; deceased said he would'nt shoot a chicken; noticed the bearing of Swan daily while he was in town, he went with his head down, and looked dejected; would not engage in conversation, had previously appeared differently; know Swan well; knew no one more respectable and affable; don't know of any one more quiet and peaceable; know deceased; have heard that a person was really in danger of coming in contact with him; have thought that if he met him in a passion would begin to look out for a knife. Adjourned.

3 o'clock, P. M.

Mrs. Conner called.—Her husband is keeper of the jail at Cumberland; knows Dr. Moore, (a witness examined on part of the State,) never invited him to go into see Swan or other prisoner; never saw Dr. Moore in jail; might have been; a great many persons go in; am confident never saw him go; have no sister or daughter about the jail; no one but herself and husband; never let anybody in the private way through which Moore says he passed out; it is forbidden to all persons.

Wm. Baird called.—On night of shooting was in Mason Price's office; Swan came in about 7 o'clock; said he had been compelled to do a very serious and disagreeable act; he had killed Will Sprigg; he was much agitated; his voice and limbs tremulous; left in a short time, saying he wanted to go and see his mother.

Cross-examined.—Can't say there was anything in his manner exhibiting a want of reason.

Wm. P. Wood, recalled.—In regard to difficulties at the ball, deceased had told witness that Swan had interrupted the dance by miscalling the figures; upon deceased's speaking to him, telling him he was wrong and out of place, Swan replied by telling deceased he was out of place also; deceased further said

that Swan had interrupted the dance twice, by turning a lady he was dancing with; don't know what he meant by saying Sprigg was out of place; deceased said if he had had Swan out, he would have whipped him.

Cross-examined.—Deceased bore the character of being desperate. Went into *Unionist* office about two weeks after conversation, and found a communication from deceased was being put in type—this was on the evening of the night deceased was killed; told Mr. Roman of the intended publication, and he went to see about it; didn't see deceased again until he was killed.

J. Heffelfinger called.—Deceased had boarded with him; considered him passionate and disagreeable; never heard of his character as a peaceable man. [Gave a description of room, position, &c., in which Sprigg was shot.]

Daniel Wineour called.—Was in the cellar when deceased and Wood had some words; heard McDermet say, "Will, I thought that matter had been settled between you and Swan;" Sprigg said, "he had signed some sort of an instrument, written by Sam Semmes, and if it was to go over again, he would not do it; that he had only done so to gratify his own friends." Wood said, "it was well you did not meet Swan, for if you had, he would have killed you;" deceased said he had no fears, for he had tried him, and he was a d—d coward; didn't believe he would shoot a cat." Deceased asked Wood to step out. Witness said to Wood, "be careful;" had told Sprigg, was sorry the difficulty could not be settled; Sprigg said, "Swan was a d—d cowardly son of a b—h; he had been in Hagerstown, publishing lies about him, and he'd cut his heart out;" witness told Swan of this, and that he had better be careful; Swan said, "he was not afraid." Never heard Swan speaking harsh of deceased. The day before or on the day of killing, had told Swan of this. Had understood deceased to be a violent man, and that in quarrels he would most likely shoot or cut, had never seen him carry arms; Swan is regarded as mild, amiable, gentlemanly and courteous—remarkable for his amiable qualities. Knew him from his infancy.

Charles Brace called.—Passing out of Devecmon's store, saw persons standing on corner, heard deceased say, "d—n him, if he don't take care I'll kill him yet;" went into the store and stated the fact; knew it was deceased by his voice, though it was night; also saw his person; knew Swan for ten years—never knew anything said against him.

Charles Howell called.—Sunday before killing, deceased said Bob Swan was a "d—d liar and coward; and he could prove him so in any court of justice;" had passed over to

deceased, from seeing him agitated. Swan had just passed down the street; can't say whether deceased saw him; never heard any body say any thing against Swan; there was a difference of opinion in regard to deceased's character.

Jas. W. Stoddard called.—Is mail agent between Baltimore and Cumberland; in passing down, Swan came into mail car, and gave him a copy of the printed apology, saying "he had a few copies printed for friends, to show how the matter had been settled, and that he was glad there was an end of it, for if he had gone to the field, he would rather Sprigg would kill him, than he should kill Sprigg; Swan spoke of his regard for deceased's family; said he was on his way to Hagerstown. On return of witness to Cumberland, deceased asked witness if he had seen the circular; said he had; deceased said he had heard that Captain Davis had said Swan had acted like a man—had proved himself such; that if he said so, he would slash him. Witness advised deceased to drop it, as he had the better of it; meaning he had spit in Swan's face, and Swan was satisfied with an apology; said he would not; he would publish him; witness said he will shoot you; deceased said he was'n't afraid; he was a d—d coward, and would'n't shoot a chicken; never saw him again; was in Baltimore when he was killed.

Cross-examined.—Suppose that deceased was angry at Davis, because he took sides with prisoner.

Joshua Johnson called.—Knew deceased from boyhood; general character is that of a desperate man; people generally avoided his company; if insulted, he would use his knife; knew prisoner from childhood; his character is very fair; civil, kind, courteous, and gentle; after the killing, prisoner's manner was dejected and downcast.

Cross-examined — Can't say am an enemy of deceased; had a difficulty with him; never come back to friendly intercourse; he struck at me with a knife, when I struck at him with a hammer. Deceased had pretended friendship, but he had found him out, and always avoided his company, for merely contradicting him, he aimed a blow with a knife; witness struck at Mr. Fell for arresting the blow at deceased; was a rival of deceased's in business. Adjourned.

TUESDAY, SEPTEMBER 20.

The examination of witnesses on behalf of the defence, was continued.

Wm. B. Barrel, recalled—On Sunday night, after the insult by spitting, met Sprigg at Heffelfinger's hotel, who spoke of a challenge; did not state terms but said he could not notice a challenge sent in that way; it had been left for him at the bar; said he had been out of town, at his father's all day;

and the bar-keeper had handed him the letter upon his return, after night.

Geo. W. Blocker, called—As sheriff of Alleghany, had visited Swan in jail; the morning after he was committed; he seemed somewhat excited; he is naturally quick; he talked rational; spoke with him about shooting Sprigg, and he said he had done the act in justification of his honor; that he was sorry for it, but having done all he could, there was no other alternative left. The funeral was expected to pass, and witness asked Swan if he would like to see it; he said he did not know; invited him to do so; Swan said he would, if not exposed to the public gaze; witness told him he could avoid that, and placed him in a position to do so. Upon seeing the coffin and the friends of the deceased, as the funeral passed, Swan's head fell, and he cried, and continued downcast.—Swan's general character was that of a quiet peaceable boy, a gentlemanly and inoffensive man, very polite and kind, and had never heard anything to the contrary. Soon after Swan's commitment, had given orders not to admit any person in the jail except having a note from himself, and witness said he had never given a permit to Dr. Moore, (a witness on part of the State.)

Cross-examined.—Dr. Moore has a good general character; would believe him on oath.

James C. Magraw, called—Late Postmaster at Cumberland, and formerly head of an Academy in Allegany county. Sprigg bore a bad character; was regarded as a desperado: often heard it remarked that he would never die in his bed. Swan seemed greatly changed after the insult; seemed depressed and undetermined; previously very cheerful.

Cross-examined.—Never had any difficulty with Sprigg—he seldom came to the post-office; often sent him word when letters were there for him.

George S. Evans, called—Sprigg bore the character of being abusive, and when excited would cut or shoot. Knew Swan from his childhood; he was peaceable, clever, and a general favorite with all.

Cross-examined.—Sprigg was naturally excitable—quick to resent or forgive an injury; generous, open hearted. Can't say that Sprigg carried arms.

John F. Fetterman called.—Sprigg's character was bad; passionate, desperate and irritable.

John White, called—Justice of the Peace; resides in Cumberland. Sprigg was excitable and violent; never heard anything derogatory of Swan's character.

Michael Triber, called—Sprigg was a violent man; Swan

sociable and peaceable; Swan's appearance and deportment much changed after the insult; he seemed greatly depressed, and in a deep study as to what to do.

Wm. K. Newman, called—Sprigg was a quarrelsome, desperate man; Swan's character good; never heard any thing against it; after the insult there was a marked change in Swan's appearance and manner, especially on the day of killing.

Francis Donnelly, called—Sprigg coming into witness's cellar, McDermott accosted him as a duelist; Sprigg said no, (Swan) had not pluck enough to kill a cat, or challenge him, and if he should, he would cut his d—d head off; Sprigg's general character was not good.

James Furgeson, called—Sprigg was a man of violent temper; never heard anything disrespectful in regard to Swan; had talked with him after the insult; found his mind disturbed and unsettled; offered to sell the store witness was occupying, and said he would take it out in smoking; his conduct was so remarkable as to cause witness to speak of it; saw Swan soon after the killing, he was greatly agitated.

John M. Buchanan, called—Sprigg was of excitable and violent temper; Swan mild, amiable, and courteous; knew him from childhood, and have never heard any thing against him.

Norman Bruce, called—Sprigg was of a desperate, quarrelsome disposition; Swan just the contrary.

Wm. B. Barrell, re-called—Sprigg was quarrelsome and would use a knife in a quarrel; Swan peaceable and quiet.

Andrew E. Kennedy, called—The first knowledge I had of the difficulty, was derived from Sprigg, a short time after he had spit into Swan's face. About an hour after this, was in a sleigh with Mr. Roman, when Swan jumped into the sleigh, and had some conversation with Mr. Roman, some parts of which I could not avoid hearing; from this conversation I inferred that Swan had placed the matter in the hands of Mr. Roman, and so I said to Sprigg a few minutes after, when I stopped at Dr. Dougherty's office to see him. My reason for telling this to Sprigg was the fact of Sprigg's requesting me to come into the office and lock the door, as he (Sprigg) was without arms, and Swan had already been there to seek him.

On Monday, January 24th, Sprigg accompanied me to my office, when he gave me a history of the whole difficulty up to that time. Sprigg spoke of the occurrence at the ball-room, and said that he would not have deemed Swan's conduct as insulting, and would not have taken notice of it, but for the fact that Swan refused to apologise for it to him, but had done so to the ladies present at the time. From Sprigg's own statement I thought him the offending party, and so told him. Sprigg

was at a loss how to act under the circumstances, and consulted with A. J. Ogle, of Penna., who, Sprigg said, advised him to spit into Swan's face. I told Sprigg that it was fortunate for him that Swan was not armed at the time, when Sprigg said that Swan was "too damned a coward to shoot a chicken;" that if he (Swan) had resisted him he would have "cut his damned heart out with a knife" which he had with him at the time. I declined acting in any other capacity than as adviser, in consequence of my then unfriendly relations with Swan.

During this conversation Sprigg frequently spoke of Swan as a coward; and, also, frequently said that he would have cut his damned heart out, in case of any resistance. He, also, often expressed his regret at having spit into Swan's face, and that he had been badly advised. His conduct was very strange—one moment violently abusing Swan, and in the next expressing his deep regret at his own conduct.

On the evening of that day, about 7 o'clock, I met Swan, who spoke to me for the first time for several months. He said: "Kennedy let us forget whatever unpleasant has occurred between us; I am in a most horrible condition, and do not know what to do; Sprigg has spit upon me, and I am entirely without friends to act for me." Supposing that he wished me to act as his friend, I at once declined, and spoke of what had passed between Sprigg and myself. Swan then left me and went over to Dr. Scollay's office.

On Tuesday Sprigg had another conversation with me, during which he was violently excited and made use of the very harshest expressions towards Swan. Either just before dinner, or immediately after, upon the same day, Sprigg came again to see me and intimated that Swan would accept an apology for the insult. I did not think this could be true, but on Sprigg's assurance that it was, I advised him to give an apology—no matter how broad and thorough it might be. In speaking of the insult, with reference to an apology, I characterized the act as "an ungentlemanly one," when Sprigg jumped up and said that no one should talk to him in that manner. I then remarked, "I did not mean to offend you; but if you cannot take my advice in such way as I choose to give it to you, you had better go to some one else." Sprigg then said, "Oh! I am making a damned fool of myself again." He was reluctant to give an apology; but after being urged most earnestly by me, to do so, he left the office, saying that he would give it. That night I met Swan, at Dr. Scollay's office, when he showed me the apology, and expressed himself as greatly gratified in having the difficulty thus amicably adjusted.

In the conversation had with me on Monday, 26th January,

Sprigg gave an account of the interviews between Swan and himself on the previous Saturday and Sunday nights. On Saturday night when prisoner called him out of the bar-room of Cowton's hotel, he drew his pistol and said to prisoner "I am ready for you in any way;" that prisoner proposed to go into the stable and talk the matter over, but, on deceased's objecting, they went up-stairs to No. 5. The particulars of this conversation I do not remember, but the impression left upon my mind, by deceased's statement, is, that it was of an amicable character. Deceased then spoke of his interview with prisoner on the next Sunday night, after he had received prisoner's challenge to meet him on Perry's Meadow; That on meeting prisoner, he (deceased) instantly drew his revolver and said "Bob, you are no better than an assassin and you had better change the hour to 6 o'clock in the morning instead of 11 o'clock," when prisoner said "Will, I was just coming to ask you to let me withdraw that challenge; I think the matter can be settled in some other way;" that deceased refused to allow him to withdraw the challenge. His reason, as mentioned to me, was that he would not accept a challenge sent in that way; and that he wanted to show his friends that prisoner had sent him a challenge of that horrible character. Deceased then said, that at prisoner's instance they went over to the steps of the Mineral Bank, and there talked the matter over; that prisoner said he wanted to withdraw his challenge on account of his intimate friendly relations with Miss Molly Sprigg, and the Sprigg family generally; that when they parted that night it was with no understanding that they were to meet on the Meadow the next morning.

On either Friday or Saturday, (the 6th and 7th of February,) deceased told me that he had heard that Swan had published the apology with some charges appended, and that if it was so, he would publish Swan as a liar, a coward and a scoundrel. I advised him not to act in any way till he had received some definite information in regard to the publication. On the next day, (Saturday,) deceased told me that he had seen the note appended to the published apology, and that Swan was a liar, a coward and a scoundrel, and that he would publish him as such to the world. On that, Saturday night, prisoner came to my office, when I told him that deceased was much excited and enraged in consequence of the publication, and asked him what had induced him to make it. Prisoner said that the insult was public, and the apology ought to have been made equally so. Surmising that he was not satisfied with himself for having accepted an apology, I remarked to him that I was afraid that he had appended the note to his publication of the apology for

the purpose of renewing the quarrel, when he instantly, and in the very strongest terms, asserted that he had no such intention. He was so very earnest in his denial, that he convinced me that he had not had any such intention. He said that he did not mean to call deceased's courage into question; that he had written the note in a hurry and in the printing office; that the only object was to remove the impression existing in the community that he, prisoner, had apologised to deceased, and not deceased to him. Prisoner then sat down at my office-table, and wrote a note to deceased, which he handed to me to read; and which I thought, under the circumstances, was too submissive and rather too truckling. Prisoner then wrote another, which he requested me to convey to deceased. [The letter is here shewn to witness who reads it to the jury.] I took the letter, but not finding deceased, I put it in the post-office. In a few moments after, I met deceased and told him that the letter was in the office. Deceased refused to go for it, and denounced prisoner in the most violent terms. I repeated to deceased the contents of the letter, and all that had just passed between prisoner and myself: of his strong assertions that his only intention in making the publication was to correct the erroneous reports in circulation, and with no idea of denying his bravery. Deceased said that prisoner was a liar; that he understood his motives; and that he would proclaim him not only a liar, but a coward and scoundrel.

On the next day (Sunday) while I was at the dinner table, prisoner came and took his seat near me, looking very pale excited. He eat his dinner very rapidly; got up and came and asked me to hurry through my meal, that he wanted to see me. In a moment or too, I went out upon the portico of the hotel, when I saw prisoner standing at one end of it, and deceased at the other. I went up to prisoner, who told me that just before going into his dinner he had seen deceased in the bar-room, when he went to the door and said "Will, come here, I want to speak to you," and that deceased replied "go to hell, you damned lying, cowardly son of a b—h; I want nothing to do with you. I advised prisoner to go down street; that I was afraid that there would be a fight; he said that he meant to act on the defensive entirely; to make no attack upon deceased. I then went over to deceased, and begged him to go away. He said that he would not go; that prisoner would attack. I told him that he need not fear an attack, and mentioned what prisoner had just said to me. Deceased cursed prisoner violently, and I suppose that prisoner heard him. I again urged deceased to get the letter which prisoner had written the night before. This he refused to do, but, after

some persuasion agreed to read it if I would bring it to him. I went, in company with Mr. Kehler, for the letter, but found the post-office closed. When I returned to the hotel, deceased and prisoner were still there. I told deceased that I was unable to get the letter, and he replied "never mind, I would not read anything from him."

On Monday we had a long conversation, in which he reiterated his intention of publishing prisoner as a liar, a coward, and a scoundrel; and that he would "degrade him in quarters where he would least wish it." He requested me to say so to prisoner; and to tell him that he was armed. I refused to bear any such message. He said "then I will get some one else to do it." I urged him not to make any such publication as that he intended, but he left me, saying that he was determined to do it. That evening I met prisoner at Dr. Scollay's office. He told me that he had heard that deceased intended to publish him in a very offensive mode, and asked me if I knew anything of such intention. I told him that deceased and myself had had a talk about it; and then, at prisoner's request, mentioned all that had passed between deceased and myself. Prisoner then said that if he (deceased) did publish him in such manner, that it would make him desperate, and force him to attack rather than defend. The next morning I told deceased what prisoner had said; he laughed at the idea; and reiterated his charges of cowardice against prisoner. I told him that he had mistaken prisoner's character; that I did not believe he was a coward. This conversation occurred while walking to my office. After we arrived at the office, I again most earnestly urged deceased not to make an offensive publication, but confine himself to a simple statement of all the facts; that it was not necessary to prefer charges of any kind; that the facts would vindicate his honor. Deceased, after some time, consented to follow my advice; and, at his request, I agreed to revise his statement for the hands of the printer. That afternoon I met him on the street; he told me that he had again determined to make the offensive publication; that he would make it at all risks. I told him that I regretted it, and begged him to go with me to see Mr. Semmes and advise with him. He refused to do this. I saw deceased again about, I suppose, twenty minutes before his death, at Mr. Betts' store; but we had no conversation. I saw no more of him till after his death; nor did I ever see his publication till it appeared in the Unionist of the next morning. Prisoner knew from me that deceased was "armed and always ready for him." Deceased having requested me to tell him so. Deceased's coat breast-pockets looked to me as if they had arms within them;

they looked so when I saw him in Bett's store. I think he had an overcoat on at that time. When speaking to me of the fact of his having gone to Perry's meadows to meet Sprigg, prisoner said that if either was to have been killed, he would rather have been slain than to have killed deceased; that he would have endeavored to have drawn Sprigg's fire, and would then have discharged his own arms in the air; and assigned as his reason his attachment to Mr. Joseph Sprigg, the father of the deceased, and his regard for Miss Sprigg, whom he loved as a sister. Prisoner denied deceased's statement of their interviews of Saturday and Sunday night, (the 24th and 25th of January,) and particularly that part of it that said there was to be no meeting on the next day on the meadows. Charles Newman came into Bett's store, and said that prisoner had killed deceased. I immediately ran up street and met Swan near Mr. Beall's house, and said, "Great God! Bob, what is this I hear?" He replied, "Kennedy, go and see the last of poor Will, I have killed him." I next saw prisoner under arrest, in the Sheriff's office. He was in conversation with Mr. Pearre and Mr. Devecinon; he spoke in excited and tremulous tones, but was subdued. I never heard prisoner use any harsh language of deceased, save in one instance, when he said that deceased was attempting to bully him. Prisoner always spoke as if he was anxious to settle the difficulty amicably. Deceased said to me, that if Roman had brought a challenge, he would not have fought prisoner, but would have fought Roman; and that the fight would have been with knives. I do not remember whether he said butcher or bowie knives.

Cross-examined.—After deceased's knowledge of prisoner's publication, I do not know how often they met. My own knowledge extends only to the meeting at Cowton's Hotel on Sunday, the 8th February. I did not entertain the idea that deceased really meant to seek prisoner, and never supposed that he would attack him; and regarded as idle talk his threat to "cut his heart out." There was a very decided change in prisoner's manner and deportment. I could not say whether his mind was right or not. I did not think him responsible. He told me that he could not hold his head up in the community; that he felt disgraced; and that it seemed to him that when he was walking the streets, the boys seemed to be laughing at him and spitting in his face. I do not think the unlawfulness of the act ever occurred to prisoner. He never spoke to me about killing deceased; or about the legal right and wrong of an attack. On the day he killed deceased, immediately after dinner, he came to my office in company with Capt. Thomas, of the Army. He was disconnected in his topics of conversation.

By Gov. Thomas.—A man's mind may see the difference between the right and wrong of an act, and yet his will be too strong to permit him to pursue the right. Prisoner is a very impulsive man. His impulses have prompted him to say and do things which he afterwards regretted.

Judge Perry, recalled.—He testified to a letter he had received whilst in Hagerstown, from prisoner, dated Cumberland, February 7th, informing him of deceased's being annoyed at his publishing the apology, and of deceased's declaration to shoot him.

Dr. Macgill, called.—Testified to a letter having been received in his family from prisoner, of the same date, conveying similar information, etc.

Judge Perry, recalled.—Prisoner showed what he said was an apology; witness told him his being seen so much in company with deceased's relations, it might lead him and others to believe that he had been over anxious to procure it; had advised Swan to furnish his friends with a copy of the apology to enable them to correct false impressions; had told him that a man who would spit in another's face, though he might apologise for it, was not a fit associate; had told him after hearing the explanation in reference to the language of the apology, that it was all right and proper.

Cross-examined.—Didn't return to Cumberland until after the killing; there was no postscript attached to the copy of the apology Swan showed me.

Frederick Minky, called.—Saw Swan on the night of the killing; he said he had made up his mind to kill him; was bound to do it; felt justified in so doing; and did kill him; prisoner said he was not excited, was calm, but he looked pale and his voice indicated excitement.

Mr. Cutter, called.—Was at the Hotel; heard the firing; saw the man fall; prisoner said to him, "I've killed Will Sprigg; I came for that purpose, and am glad of it;" thought prisoner not in his right mind; had never seen him before; advised his arrest.

Cross-examined.—Opinion as to his mind resulted from the circumstances attending the killing; since hearing of all the circumstances am of the same opinion; believe the killing the result of excitement, and not the excitement the result of the killing.

Daniel Dudley, called.—Testified to prisoner's sitting in Roman's office for an hour and a half on the day of the killing without speaking a word; deceased recognized as reckless and fiery; prisoner very peaceable; deceased's fault consisted in a quickness of temper.

J. P. Roman, recalled.—Prisoner assigned as a reason, wishing to avoid a collision, his regard for deceased's family and fear of an interruption of his position with a lady in Hagerstown; prisoner told him of the certainty of the publication to be made

by deceased; witness ascertained it to be true, but didn't see prisoner in time to tell him before the killing; never heard Sprigg entertained ill will for me until after his death; they frequently conversed together; prisoner assigned anticipated publication as the cause of his desperate state of mind.

Daniel C. Bruce, called by State.—Saw prisoner at Cowton's after the spitting; looked melancholy; deceased came up; seemed agitated; caught prisoner by the arms and said "Bob I owe you ten thousand pardons; I thought you intended to insult me at the ball, but from what my friends tell me I am satisfied you did not;" not having heard of the difficulty, I was surprised; they crossed the street, to talk the matter over; next saw deceased again; asked him about the matter, and he told me about the spitting and apology; witness said is it possible; deceased replied it was, and that he knew it was a d—d bad act; witness said, "Will, I have often told you that your bad temper would get you into trouble, and if not careful be your ruin;" deceased said, Bob insulted me grossly at the ball, and said, "Dan, I know you well enough to believe if it had been your case, you would have knocked him down even in the presence of ladies;" deceased was very profane and excitable.

Cross-examined.—Deceased, after what had previously taken place, under my knowledge, gave the impression that he was *not* sincere; can't say what day it was, but it must have been before the 1st of February.

By the State.—Can't say what passed at the conversation across the street, to lead to a change of feeling and opinion; deceased seemed sincere, when he first met prisoner and cordially grasped him; believed deceased to be a candid man, and what he had to say generally came out; he was of quick, impassioned temperament, truthful and brave; he would resent in such manner as to suit the insult. Adjourned.

WEDNESDAY, SEPTEMBER 21.

The evidence on the part of the defence was continued.

James Hand, called—On the 24th of January, after tea, at Heffelfinger's hotel, saw Sprigg, and asked him about the difficulty between him and prisoner; he said he was dancing with his sister, aunt and two strange ladies; prisoner, in dancing, turned one of the ladies; deceased told him he was wrong; prisoner said, "No Will, I am all right," and turned another lady; deceased told him if he made another step he would knock him down; prisoner then stopped; after the dance, prisoner was going around the room laughing and talking to the ladies; deceased told witness that prisoner said he could not apologise to deceased, but could to the ladies; said he had given prisoner time to apologise, and was determined to insult him; that he

had walked down street, used some insulting language, then spit in his face; said he had understood prisoner had armed himself, and was waiting in the barber-shop below, to see him pass, so as to shoot him through the window; that he was'n't afraid of him, for he was too d—d a coward to shoot anybody; deceased said the report was correct that prisoner had met his sister, and told her he was in search of her brother Will, to kill him, as he had spit in his face. She said if it had been anybody but Swan, she would have had him arrested; deceased said prisoner had called on him at one of the hotels, and said to him, "Will, I want this matter settled," deceased put his hand in his breast-pocket and either drew a weapon, or was about to do so, and said "draw;" prisoner threw up both arms and said "Not in that way, I wish it settled amicably." Witness then asked him how the matter stood? Sprigg said he had apologised to prisoner, and said, "I am all right; Swan may wipe the spit out of his face the best he can." The next conversation was between witness and prisoner, on the 4th of February, the day prisoner came in the cars on his way to Hagerstown; saw him in mail-car, when Stoddard said to him, "show Jim one of those apologies;" prisoner did so; had often spoke of prisoner in Baltimore and elsewhere as a coward, and wished an apology to show his friends, and correct himself with regard to it. Witness told prisoner what deceased had told him, and that from his story he had said he was a coward; prisoner told him another story; that the matter was settled and he was glad of it; that deceased had said many hard things against him, but he forgave him; that if deceased had met him when he called him out, he would have rather had deceased kill him than he should kill deceased; that he had eaten at his father's table, slept in his bed, and had great respect for the family; that his sister was his friend and confidant; he respected her as a sister, and how could he do otherwise? Sprigg's story had induced me not to speak to Swan previous to this conversation, because I supposed him to be a coward. Deceased was considered very hot-headed and quarrelsome; as a man who would, in a quarrel, use anything he got in his hand. He was quick to receive an injury, and quick to resent it, and took offence at trifling causes, often before he gave himself time to reflect whether he had cause or not.

J. P. Roman, recalled—Was in Cumberland at the Assembly; next Wednesday night saw Mr. Wood on the corner. Next Wednesday was on way to New York. Prisoner asked me to act as his friend, told him I could not, that a man's own nature ought to suggest the remedy; that he didn't want any friends, and suggested to him the case of Ritchie and Pleasants; told him he couldn't compel Sprigg to fight him a duel—that he had

spit in his face and degraded him, and would refuse to fight him, compelling his friend to fight for him. Swan thanked me for the suggestion and left. Thought it would be better to go out and fight as proposed, than to have a street broil; would have acted as prisoner's friend, in bringing about the settlement, but that there could be no atonement for the indignity.

Henry H. Ainsworth recalled—Heard of the challenge; went to the Mayor's office, who said I ought to arrest them; told him I couldn't do it, unless affidavit were made; saw Sprigg, spoke to him about the challenge, and that I was going to have them both taken up; he said, "don't do that, I am about to settle it;" said he wouldn't have spit in Swan's face, but he was advised to do it by a friend; if he had it to do over, he wouldn't do it; but would kick his d—d a—; said it was a d—d dirty trick to spit in a man's face; had heard nothing for a day or two. Deceased came down street and said to witness: "I have settled that matter." Some one saw a button hole of his over-coat torn, and asked him if Swan had shot that. Deceased flushed up and said, "No, he is too d—d a coward to shoot any thing." Deceased said he had received a kind of challenge, left for him in the bar-room; spoke of going to Perry's meadows; said he wasn't d—n fool enough to do that; that Swan might shoot him before he got on the meadow; said he didn't fight duels that way: if he had sent a friend to him, he could choose his own weapons; said he wished he had sent a friend, that he would like to get hold of his friend, for he believed his friend had more to do with it than prisoner. Deceased said he thought the insult at the ball was an old affair. Saw him a few evenings after; was in an oyster-house, when deceased came in. Alf. Kline said to him, "My honey, if you'd spit in my face, I'd have brought you to the scratch." Deceased said, I don't know what you would do, but Bob Swan is too d—d a coward to bring any body to the scratch." This was after he said the matter was settled.—On the Sunday before deceased's death, saw him in Cowton's hotel; was very angry and said, "Gentlemen, I pronounce Bob Swan to be a d—d scoundrel, liar, and coward, and I am going to publish him to the world." Saw him afterwards on the same evening, when deceased used the same abusive language towards prisoner.

The deposition of Henry G. Worthington, now in California, was then read, detailing conversations with deceased; in which deceased's abusive language and threats, as detailed by other witnesses, was given.

James Finnegan was then called, and was interrogated with reference to a conversation with deceased four or five years ago. This was objected to by counsel for the State, and the point ar-

gued before the Court. The argument occupied considerable time, and the Court adjourned before the point was decided.

3 o'clock.

Court met.—Mrs. Swan testified as to the state of mind of the prisoner soon after the killing. Robert came to her place of dwelling—entered her apartment with hat and coat off; said: "Mother, how can you live in such a hot room as this;" he seemed much agitated; witness was preparing her grand children for bed; the children were saying their prayers; Robert said: "Mother, may I kneel and pray with them?" Witness replied, "certainly, my child;" he knelt, seemed engaged in prayer, and wept. Upon rising, he caught hold of one of the children, and said, "Oh, Sally, you will still love me, let the world say and do what it may." Robert laid himself down on a sofa, and appeared very unhappy.

The Court here decided the point raised this morning as follows:

"The admission of this testimony, is rendered proper by the wide scope of evidence conceded in this controversy.

"The State have allowed the general character of the deceased for peace and quietness to be given in evidence, and both the State and the prisoner's counsel, have allowed the declarations of the deceased and the prisoner without exception, to go to the jury. Much of this testimony goes to show the character of the transactions between the parties; but much also, very much, goes and is intended to show only the character of the individuals. Strong expressions, bitter epithets, on the part of the deceased, not legally connected with any action, have been offered in evidence to shew his vindictiveness of character. The door being thus opened, the Court thinks that evidence of an old grudge, continuing in the breast of the deceased towards the prisoner, until the death of the former, may for like reasons be admitted. An old grudge still subsisting in the mind, is certainly evidence of present ill-feeling, and illustrates as much as any declaration could do, the general character of the individual for want of forgiveness and forbearance. But the prisoner's counsel, before they offer this testimony, must be satisfied that they will be able to prove the continuance of this old grudge in the mind of the deceased up to the period of his death. Also, that he was influenced by it, in his late conduct to the prisoner, and that the prisoner knew that it existed in the bosom of the deceased at that time. For without the knowledge of its existence on the part of the prisoner at the time of killing, he cannot possibly be supposed to have been affected by it. This testimony has nothing to do with the issue in this cause, except so far as the general character has to do with it. The Court expect that

the counsel for the prisoner will not go into unnecessary detail, or further than to shew that there had been a grudge; that it continued to exist, and that its existence was known to the prisoner at the time of the killing."

Mr. Price said he would not call the witnesses to the stand at this time, but would wait to be certain of other testimony, to carry out the views of the Court.

The defence then presented the deposition of A. J. Ogle, in denial of the advice alleged by deceased, to have been given to him.

After argument by counsel, the Court refused to admit it in evidence.

Mrs. Anne M. Norris, called.—Testified as to having heard deceased utter threats of violence against prisoner, in the event of catching him with his girl, or about his premises.

Archibald Carey, called.—Prisoner came to witness' printing office, about the 1st of February, showed a letter of apology; penciled a few lines on a piece of paper, in much haste, and in such a bad hand that witness had to transcribe it; he asked that the note be appended at the bottom of the apology; said he wanted it published; said the insult was universally known, and he wanted the apology published, as a number of his friends in the lower part of Maryland would never hear of it, unless he sent them a copy; witness advised him to put it in a circular form, to be sent through the mail; he ordered the printing of two quires—about forty copies; prisoner was not more than five minutes in the office; in copying the note, witness gave prisoner's own language and meaning, handed prisoner the printed and manuscript copies next day; the hand preceding the note was not on the original manuscript; it was placed there as a custom in the office; prisoner did not see the hand on the printed copies when receiving them; no copy was retained in the office; witness was not certain about prisoner cautioning him not to let them get out, but seeing that it was an important personal matter, he so instructed the hands in the office; prisoner did not examine the printed copies, and has not since said anything about the hand being appended.

George B. M. Price.—On the night of the killing Swan came to his office; said he had killed Sprigg; seemed much agitated; looked as though he was ready to cry. Witness, with others, went to see the corpse. Deceased was considered a desperate and dangerous man; prisoner a very clever fellow.

Thomas Devecmon.—Was called and asked to narrate certain declarations made to him by Dr. Moore, who had formerly been examined, to which the State objected, and after some argument and consultation as to whether Dr. Moore should be re-called,

(he having gone to Cumberland, by permission, in consequence of a death in his family,) the Court adjourned.

THURSDAY, SEPTEMBER 22.

The evidence on the part of the defence was continued.

Thomas Devecmon, re called—About half an hour after the killing saw the prisoner at the magistrate's office, he was in a back room, was vomiting.

A discussion arose at this point, growing out of intimation from counsel for the defence of a design to prove by the witness a statement made to him by Dr. Moore, of what he had heard prisoner say in the jail of Cumberland, in regard to the affair, which resulted in an agreement to recall Dr. Moore, (who had been allowed to return home in consequence of a death in his family.)

Mrs. Cowton, called—On the night of the killing, having heard of it, started to go over the street to her brother's (Heffelfinger's) hotel, where it occurred, and met prisoner near his own door; caught him by the arm, and enquired, "My God, Robert, what have you done?" to which prisoner replied that he had killed Will Sprigg; asked him to go in the house, but he declined; and then told him he had better go tell his poor mother all about it; he went off; was much agitated, and seemed greatly distressed; witness was well acquainted with prisoner.

Mrs. Norman Bruce, called—Was at the assembly on the night of the 22d January; saw nothing of the difficulty between prisoner and deceased; knew only from what they had told her, soon after. Deceased said he had been made very angry by prisoner, who had turned his partner in a dance; said he thought prisoner had done so with an intention to insult him. Witness told him she thought different. Deceased said he should expect prisoner to apologise for it, that he would not have noticed such a matter except done by Robert and one other person in the ball-room; said there was an old grudge between prisoner and himself, and therefore believed prisoner meant to insult him. Swan next spoke of the affair; said there was a difficulty between deceased and himself that night. Witness asked prisoner if he meant to insult deceased by turning his partner. He said he did not. Asked him if he would go to deceased and apologise, when he said he would not, that he would see him in Hell before he would do so. Prisoner was much excited at the time. He said the reason why he would not apologise was that deceased had threatened his life in the presence of persons in the hall. Said his servant boy had told him so. Some days after the ball—and thinks after the spitting—prisoner came to the house of witness, when she asked him what was the old grudge against him; he knew nothing of it. The evening of the

day he was offered the indignity, Swan took tea, with others, at witness' house; he took witness from the parlor to the hall to talk about the matter; asked him why he did not make the explanation required by deceased, and thus save all this difficulty. He said he had twice gone to deceased to do so, but that he would not hear him. Can't say whether apology was made at the ball or not. Prisoner took a pistol out of his pocket, showed it to witness, and said, "I was caught without this thing once, but I shall never be again;" and further remarked, "this pistol will send one or the other of us to Hell." This was about 7 or 8 o'clock in the evening of the day he was spit upon. Swan was constantly visiting the house of witness pending these difficulties; had been intimate for years; sometimes two or three times a day at her house; generally talked about the matter; was generally under excited feelings; sometimes almost frantic, which increased towards the final termination. The day before the killing saw prisoner for the last time before the event; he then came to her house, and commenced talking of the matter in a wild and frenzied manner, when witness said, "Robert, I wish you would not come to talk about this affair, for you have almost driven me crazy;" at which prisoner threw up his hands, exclaiming, "My God, Mrs. Bruce, I came here to avoid the world, and if you drive me out, where shall I go? I feel as though I can't look a negro in the face, and as if the finger of scorn was pointed at me, when upon the street." He was very intimate, and when coming to the house, and finding me out of the parlor, he would seek me in the kitchen, to talk of the matter, and spoke freely of his affairs and his attachment; more excited the day before the killing than ever before seen; talked sensibly, but in a fearful state of excitement; was much distressed.

By defence.—One week after the first difficulty, witness was at another of the assemblies, when deceased asked her if she knew anything of Swan, and whether he would be at the ball; told him she had left Robert at her house, playing a game of whist with some ladies. Deceased said he hoped Robert would come; that he had treated Robert badly; was sorry for it, and ashamed of it; that he would be sorry if what he had done to Robert, should be the cause of keeping him away; said it was an act of his life he'd regret as long as he lived; that it would be a lesson to him, and hoped that it would be to Robert. Asked him what had induced him to offer such an insult to Robert, and whether he was advised to do so. He said, he had not been advised to spit in his face; that Ogle had advised him to slap him in the face; said, that in spitting in his face, he intended the grossest insult one man could offer another, so as to force him to fight, and in the event of a challenge, he would

have choice of weapons, would choose knives, and a bloody battle it would be.

Cross-examined.—Had held other conversations with Swan, which were of the same character. When visiting witness, and talking about the affair, other persons should come in, he would be silent for some time, and then join in other conversations; talked sensibly. No other person present during the conversation on the day before the killing; didn't try to divert the conversation; didn't hear Swan threaten Sprigg's life in any of these conversations, as remembered.

Cross-examined.—Whilst talking with deceased of the ball on the 29th, one week after the ball at which the difficulty occurred, Swan came into the hall. Witness mentioned it to deceased, who went promptly up to Swan, put his hands on his shoulders, and asked him to dance opposite him in the next cotillion. Swan said he'd do so; went and procured a partner, and danced accordingly. Saw deceased the evening before the killing; he had come across from the post office; said nothing about the difficulty. Deceased was never but once at witness' house, as remembered, and that was before the difficulty. Deceased knew of the friendly relations between Swan and witness. Swan's general manner of conversation was excited; rather boyish sometimes.

By State.—Nothing to show insanity of mind; the thought never occurred of his being insane.

By defence.—Thinks had heard him talk disconnected on other subjects; at last conversation on the subject, he walked the floor and wept; had seen him weep before.

By State.—At the second ball, two days after the apology, Swan seemed calm. Sprigg and Swan seemingly acted upon friendly terms. Thinks Swan came to this ball about 11 o'clock, and remained until it was ended. They conversed friendly in the dance; but can't say they conversed otherwise. No recollection of seeing them together after the ball.

Arthur Johnston, recalled, and cross-examined by the State, Had read the publications by Sprigg after the killing; never saw it before; denied having heard and seen certain transactions to which Sprigg in the publication alleged he was witness; had no recollection of conversing with Colonel McKaig, or of saying to him that Sprigg's publication was all true.

By defence.—Had'nt denied the truthfulness of the publication because he had not seen it until after Sprigg was dead.

By State.—Don't think ever told Willison that Sprigg drew a pistol; could not say so because did not see him draw a pistol; only saw him put his hand in his breast.

James Finnegan, was again called to the stand; when, Mr.

Price intimating that it was now designed to elicit evidence of a grudge on the part of Sprigg of years standing.

Mr. May objected, and pending argument thereon, the Court at 1 o'clock adjourned.

The Court again met at 3 o'clock. After further argument on the above point, the Court sustained the objection, assigning similar reasons to those given when this same witness was interrupted.

Denton Brown recalled.—Saw prisoner at the magistrate's soon after his arrest on the night of the killing; he was greatly excited; remarked to him I had thought the affair settled. Prisoner replied that it had been, but Sprigg would not let him alone; he was sick, and vomited. Dr. Scolley said something to prisoner which witness could not hear, prisoner said he supposed he'd have to go to jail, and asked the doctor to get him a bottle of brandy and a copy of the Pickwick Papers, as it would be very dull there.

By State—Knew Dr. Moore; never heard anything against him, except that he drinks; would have no hesitation in believing him on his oath.

The general character of Sprigg was that of a hot-headed man, easily excited and when so, violent; never heard of his being a dangerous man; never heard his character for veracity questioned; he was ready to forgive an injury upon an apology; knew him for twenty years. Never saw him carry arms. Didn't think prisoner deprived of reason, but never saw a man more excited. Thinks there are one or two other persons in Alleghany as quarrelsome as deceased. Had heard persons say deceased was generous and kind-hearted.

Daniel B. Cramer called—Was in the billiard room when prisoner was playing a game, and deceased came in, and stood steadily looking at the game, with his hands in his trousers pockets; prisoner seemed engaged; can't say whether deceased was gazing specially at prisoner; deceased had visited the room only about six or seven times during the month witness had the room previous to the killing; never saw deceased strike a ball. Had spoke to Willison about the matter of his visits, and corrected his first impressions; thinks he had seen deceased two or three times in the room when prisoner was there, after the spitting; deceased's manner in the billiard room looked like bullying prisoner; offered Swan a glass of brandy as he passed out of the room, but he declined it; prisoner came back a short time after—opened the door and looked in, and passed off; witness heard report of a gun, and remarked that either Sprigg or Swan were shot; went over to see about it, when prisoner said, "I have killed Bill Sprigg, and if there

are any of his friends who want to resent it, I am ready to defend myself;" prisoner said he was cool, but seemed greatly excited; he looked wild—pale in the face—red spots on his cheeks; took him out of the hotel; had expected a fight in the billiard room; didn't remember telling counsel (Mr. Price) certain things.

John Anderson recalled—Had seen deceased between the periods of the insult and the death, and took a pistol out of deceased's pocket about three or four days after the spitting.

Mr. Price said the defence were nearly through with its testimony; that there was another aspect of the case which required the examination of medical gentlemen, which would be commenced to-morrow.

FRIDAY, SEPTEMBER 23.

The Court met and proceeded with the examination of witnesses on the part of the defence.

Arthur Cowton, called—Lives in Cumberland; prisoner boarded at my house; heard of the shooting; prisoner soon thereafter came over with a gun in his hand, and said "I have shot Will Sprigg, and I want you to bear witness to it," and passed out. Witness remarked at the time that he thought prisoner was crazy; nothing unusual in his voice; his face was very white. Deceased was irritable in temper, violent in a quarrel, easy to take offence, rather dangerous when in a quarrel, would use any thing he could get hold of in a quarrel.

Cross-examined—When generally under pressure of high temper, looked pale and changed in the appearance of the eyes; thought his remark singular; was under unnatural excitement. Deceased bore the character of being generous, kind hearted, quick to resent an insult and to forgive.

Andrew E. Kennedy recalled.—When I saw prisoner in the sheriff's office, after his arrest, he was very much excited; he spoke in very tremulous tones; when it was suggested to him that he would have to go to jail, he seemed utterly prostrated; so much so that he vomited. The idea that he had committed an act for which he was legally responsible, seemed to occur to him for the first time. I never thought that he had ever before contemplated the legal right or wrong of killing dec'd. Prisoner, during the whole difficulty, seemed to suffer intensely; and from this fact, and the others which came under my cognizance, I did not consider him responsible for any acts committed, even the killing of deceased.

Cross examined.—I never approved of the acceptance of the apology by prisoner, and so told deceased, but never said so to prisoner. There were some peculiar circumstances surrounding this particular case that might, had I known of them

before, have induced me to modify my opinion that so degrading an insult as spitting in the face of a man could only be atoned for by a fight.

Dr. Scollay recalled, and testified that he was a practising physician, and has been since 1848; has not made medical jurisprudence a particular branch of study; was in the magistrates' office after prisoner's arrest, and shortly after he had an attack of vomiting; continued thought upon any one disagreeable subject may affect the mind—may make a man neglectful of his duties to society, and in a great measure, regardless of his other external relations. There are cases of monomania, which are produced by some disagreeable subject continually preying upon the mind. From the facts and circumstances to which witness testified, and which came under his knowledge, his opinion of the mental condition of prisoner at the time of the occurrence, is that he was morally and intellectually incompetent to form a correct judgment in regard to the act. The expression of his eye after the killing, and his manner, induced me to mentally exclaim, "my God, is Bob crazy!" Powerful action on the brain will often produce vomiting. There have been cases of delirium tremens in which the nervous system is deranged, where sickness of the stomach is an attendant symptom. Vomiting will relieve the brain when derangement has been produced by strong nervous excitement. Vomiting is a symptomatic attendant of derangement of the nervous system, of which the brain is the centre. Fear, anger, or any high nervous excitement may produce vomiting in a man whose mind is perfectly sound. Prisoner would often come to my office, sitting for hours with his head down and whittling; sometimes talking incoherently to himself. I did not consider him exactly a proper person to judge as to what was necessary for the protection of his honor. I have said that prisoner was acting very foolishly in this matter. Think at that time he was not capable of deciding in his own mind whether his act was right or wrong, but think he was under the impression that he was right. At the time he committed the act, do not think that he was capable of deciding whether he was doing an act that was right or wrong. His expressions that night, after the occurrence, led me to believe that he was sorry he was compelled to commit the act. Think that he was incompetent, at the time of killing, to judge of the legal or moral wrong he was committing.

Dr. Macgill testified that any one thing continually acting on the mind is apt to dethrone reason, and liable to make the individual regardless of other outward considerations. He then went on to cite numerous cases in illustration of his po-

sition. He had heard all the testimony with regard to prisoner's condition of mind, previous and subsequent to the killing, and is of the opinion that he was laboring under a species of moral mania which totally unfitted him to judge as to the right or wrong of his action at the time he committed the deed.

Major Archer was in command of the company in Mexico, of which prisoner was lieutenant, and had an opportunity of studying his character. His character was that of a brave, impulsive, generous young man, and not quarrelsome. Among men who conform to the code of honor, it has been my opinion that a mere apology for the insult of spitting in the face was not considered sufficient. Swan was in the battles of Contreras, Cherubusco, Molina del Rey and Chepultepec.

The testimony of the defence was here closed, counsel reserving the right of introducing rebutting testimony.

The State then proceeded with rebutting testimony, calling Samuel M. Semmes, who testified that about the 27th January, 1852, Dr. Scollay called at his office and showed a letter of apology, dated the day previous. It was drafted by prisoner for the purpose of procuring Sprigg's signature, but he had refused to sign it. Dr. Scollay said he had taken up Swan's case from motives of compassion, and had engaged in a mission of peace; that Swan for some days had been passing from one person to another, could find no friends, and he had taken hold of the matter to bring it to an end. Witness thereupon took hold of the matter under similar motives, to settle the quarrel between them; witness read the letter and said he did not think it was suited to the occasion; did not think it was such a letter as Swan ought to receive; could not see any reason why Sprigg should refuse to sign it; did not regard it sufficiently strong to satisfy prisoner. Dr. Scollay had said the first paragraph prisoner had insisted on inserting, and to that very paragraph Sprigg had objected. The paragraph alluded to was as follows:

"Having conceived myself insulted by you, which I now say, upon information which came to my ears after the insult was offered by me, I am fully confident was not intended as an insult by you, I, in return, offered you the gross insult, for which I have since felt the deepest regret, it being not only a gross outrage to you, for which no suitable apology can be made, but an act unworthy of myself as a gentleman."

Witness said it flashed upon his mind, upon seeing the statement, that deceased ought to be satisfied, as prisoner had favored it, and at once concluded it should stand; At a subsequent period, and before I was aware that deceased had sign-

ed the apology, I met him in the street ; told him what had transpired, and thinking some explanation necessary to get him to sign it, told him that instead of refusing, he ought to be glad to do so, to secure the admission that when he offered the insult he did it under provocation.

Witness expressed himself in the strongest terms as to the character of the insult, as being one which gentleman could not settle by mere apology, and that he would be justified in the eyes of men of honor in giving his hand and making any atonement for what he had done, even if it were to allow prisoner to spit in his face ; that such an offence was never heard of, and no rule in the code of honor could settle it. Whilst talking I thought a tear came to deceased's eye ; he then said to me, "Mr. Semmes, I have signed the apology you have drafted." Witness took him by the hand and expressed his great gratification to hear it. Heard no more of this matter between these two young men until the 8th or 9th of February, when Sprigg called his attention to Swan's circular ; he seemed much excited upon reading the note appended to it, in the following words : "The above letter of apology was written in answer to a written invitation from Robert Swan to meet him on Charles Perry's meadows, armed as each of the parties might think proper, without friends on either side, the survivor to take care of the slain." The note conveying the idea that deceased had signed it from fear, witness expressed great surprise and indignation that such a note should have been put out, and told him it was inconsistent with the terms of settlement ; that Swan was not authorised to publish other than the simple apology. Told Sprigg he was sure Swan had been led to do so from the advice of some indiscreet friend ; that I thought him a man of too much honor to publish such a circular. Sprigg said, "I think so too, and that I know who the d—d scoundrel is." He was much excited, and I used words of peace, insisting that he should not suffer passion to lead him astray, but to place the matter in the hands of some discreet friend. He spoke about making a publication, and asked me to give him a letter.

I wanted to know whether it was not possible to settle it by explanation. Sprigg said Swan had called to explain, but he had repelled him, and denounced him as a liar and a coward. The morning before the publication, Swan came into my office, and without saying, "how do you do?" said, "Mr. Semmes, I am afraid I shall be driven to extremities yet." Without waiting to hear another word, I pointed him to be seated, and called his attention to the circular or postscript, and expressed great surprise at his publishing it ; told him whether it was

true or false, whether Sprigg gave the apology through fear or not, the circular would do him more injury among honorable men than it would Sprigg; that the note made the whole affair a puerile matter. Swan replied, "It strikes me in that light now, but I never so regarded it before." He said he did not attribute it to Sprigg's fears, but merely to let his friends know he had not rested quietly under the insult. He then left calm and collected, to seek a friendly interview with Sprigg. The morning after the signing of the apology, Swan came to my office and remained there two hours. He expressed himself highly gratified at the amicable settlement, and seemed as though a load had been taken off his mind. He spoke of his previous anguish, and said he had felt like a person cast upon the waters, floating about as chance might carry him; he had sought a fight—friends had declined aiding, and was deeply distressed up to the time of apology; that he could not see how Sprigg could sign it; rather than do so, under the circumstances, he would have descended to his grave alive. He talked in a more reasonable manner than I had ever heard him before, about the present and the future; I told him he was at liberty to publish the apology, but advised him not to do so, as he could show the written one to any friend who wished to see it. From Sprigg's character and temper, I advised him to avoid him, but to treat him courteously. I did not think them suitable companions. In telling Swan that he had dishonored himself by the publication of the note, he remarked, "Mr. Semmes, you would be surprised to know who advised me to do it."

Cross-examined.—Swan's remarks throughout never manifested a hostile feeling toward Sprigg, but impressed me that he was under a sense of what was due me in terminating an ugly quarrel. It is due to justice to explain my letter to Sprigg. I am going home, and do not want that letter, which was published with his card, to be misunderstood after I am gone. I believe that letter has, among honorable men, done more to prejudice Swan's case than any thing else. Had I known that Sprigg had said one word inconsistent with the apology, as has been testified here, I never would have given him such a letter, but would have considered him totally unworthy to have received any letter at my hands, and should have advised Swan to tear up the apology as though it never had been given, to treat him as a blackguard and a man out of the pale of honorable men, and to have taken no further notice of him. I should not have condemned Swan for what he did. As to deceased's character, he was quick and violent, and covetous of that prowess which gives men eclat from conquest in fighting. Adj'd.

The Court met.

Rev. Mr. Seiss, called.—Day after the killing was sent for by Swan; went to see him at jail; he seemed under some excitement; nothing remarkable about his mind; Dr. Scolley and Mr. Kennedy had just left him; asked him if he had any hesitation in conversing about his difficulties; he said he had none; appeared conscious of the nature of the act; said he didn't think he could realize it as fully as he ought; he exhibited a paper containing Sprigg's publications, and commented thereon; said he knew I would not justify him from the nature of the principles I preached. Don't know that he spoke particularly of the motives, but said he was placed in a trying position, and knew not as a man of the world how he could else have got rid of it; said various things in the publication of deceased were falsehoods; that he knew Sprigg to be a mean fellow from previous occurrences; made an allusion to Sprigg's conduct in regard to his late brother, John Swan, in a political contest.

Cross-examined.—Manifested no bitterness of feeling towards deceased; gave as reason for sending for me he wanted a copy of a sermon I preached on Sunday; the sermon was on the subject of forgiveness; gave him a copy of the sermon. Witness said he held it as unfair, under the circumstances, (his being a minister) to compel him to testify in the matter.

By State.—Did not consider the conversation as confidential; but as his ministerial character went with him everywhere; witness thought prisoner likely to talk with him more freely than other persons, and it would be unfair to the prisoner to extract it from him; had looked into the books and taken advice as to his right in assuming a position; had learned there was no law to sustain him—no special privileges recognised or allowed.

J. H. Seymour, recalled.—Had transacted business with Swan about the 9th or 10th of February; he acted as usual; he became excited when talking of the difficulty with Sprigg; was frequently in my store; when talking about the matter, would walk the floor whittling a stick; thinks he was mortified at what had occurred, and didn't know how to get rid of it. Knew deceased for about three years; he was rather violent when excited; never heard him spoken of as a desperado; never heard his character for truth called in question.

By defence.—Never heard Swan spoken of as being quarrelsome; but as courteous and gentlemanly.

Alpheus Bell, called.—Knew deceased for twenty years, and for five or six years intimately; he was hasty; would resent an insult on the spot; of a forgiving disposition; not a des-

perado by any means; bore a good character for truthfulness.

By defence.—Deceased was in the employ of witness as a coach agent; didn't know that he assumed a better behavior when witness was about than when he was absent; heard no complaints about him, except what grew out of his rivalry in business; he was industrious, and attentive to business; never had a better agent; claims no relationship.

Dr. Howard Kennedy, called.—Knew deceased for eight or nine years; never intimately; he was agent for a business in which witness was interested; never heard of him as a desperado, or his character for veracity doubted.

By defence—Never heard him speak an unkind word of Swan as a gentleman.

David Callan, recalled.—Sprigg was regarded as a respectable man; knew him about eight or ten years; he would strike quick.

Pending further interrogations and answers, a debate arose, growing out of an effort to ascertain whether witness spoke from personal knowledge or from local or general knowledge, upon the conclusion of which the Court adjourned.

SATURDAY, SEPTEMBER 24.

The Court met. The issue pending at adjournment, was considered.

To the question put by prisoner's counsel, to David Callan, viz: "Do you know of any other quarrel?" and objected to by the State, Judge Tyson, in effect, decided that as the witness had not rested satisfied with testifying generally to the good character of the deceased for peace and quietness, but had further declared that he had never heard of his having had a quarrel, and as he had further testified, in answer to a general question, "that he remembered one quarrel in which the deceased had been engaged," he had enlarged the issue beyond that of mere general character, and that to such issue an enquiry into the mere fact of the past existence of other quarrels between the deceased and others was not irrelevant and might undoubtedly be made in cross-examination.

Mr. Callan was then again called to the stand, deceased's general character was that of a kind-hearted man; quiet, impulsive, generous; had heard more against him in Court, than ever before; had lived in and about Cumberland for five or six years, as clerk in a store and bar-keeper; had never been before a magistrate or a Court before; deceased had come into bar-room the morning of the shooting, and after starting the coaches, laid his over-coat on a table, and witness hung it up, over a place where he slept, and thinks it remained there until taken down by Mr. Willison on next morning; knew of no arms

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By defence.—If I had known of any friendly approaches by prisoner, should have attempted an adjustment.

By State.—Believed deceased penitent and anxious to relieve prisoner; deceased felt he'd done wrong, and said he had given the apology cheerfully to relieve prisoner.

George M. Schroyer, called.—Knew deceased from boyhood; he was impetuous; quick to resent, ready to forgive; not given to bloodshed; never heard his veracity questioned.

By defence.—Deceased was very sensitive; never heard of his resenting an imaginary insult.

Andrew Green called.—Knew deceased; never considered him a desperate man; he was impetuous; ready to resent an insult, and ready to make up; never heard of his disposition to shed blood, nor of his being quarrelsome; he bore a good character as to truth; saw prisoner about the time of the publication of the apology, with the note appended; he showed me a copy across the dinner table, about the middle of the week before the shooting; asked him if Sprigg had signed it with the note attached, and he said he did; afterwards saw them pass each other on the street, but heard nothing said by them; night of the shooting, was in at Cowton's Hotel, when Swan came in and said, "I want it distinctly understood that I have killed Will Sprigg, and want you all to bear testimony;" didn't appear to be crazy; looked as usual; this was about twenty minutes after seven o'clock; the printed circular was not given confidentially; had remarked, when Swan said Sprigg had signed it with the note appended, that it was very strange. Had never seen arms about deceased.

Cross-examined.—Can't say that the establishment I was interested in furnished coaches for deceased's stables; lives in Baltimore now.

A. B. Willison called.—For three or four years associated with deceased in his business; never heard of his being a dangerous man, or his truthfulness doubted; after his death, on next morning, in searching for papers of the business, took a quantity from the breast pocket of his over-coat, found hanging in the hotel, and in various drawers in his chamber and in the office; never came across any weapons, pistols, &c. It had been supposed his effort to get out the back door, when prisoner came upon him, was to get arms from the office, but he had none there. Never heard of his carrying arms, except when he once went to aid in arresting some slaves runaway from Virginia; there was little difference in the size of prisoner and deceased; the latter had a crippled foot; an Sunday saw deceased and prisoner near Cowton's door, apart; deceased narrated the affair; said prisoner had said he was not phys-

ically strong enough to fight him, but he intended to challenge him, and not receiving it, he had spit in his face, and then went down the street and armed himself, having heard that prisoner was armed; that prisoner came afterwards to the hotel, called to him to come out, when deceased said, "I'm ready for you, Bob," and prisoner said, "don't shoot, I'm come to have a talk about the matter;" said prisoner wished him to go to the stable, but refused; went up stairs; had no intention of meeting prisoner, for the reason that he had spit in his face, and was sorry for it. Prisoner asked if he apologised what course he would pursue, and deceased told him he would do any thing an honorable man could do; that when they parted he understood it was to be left with friends to settle, Sunday evening deceased got a note from prisoner; they met after supper and deceased told him of it; and that prisoner said he had come to withdraw it; they crossed the street and conversed till about 11 o'clock at night. On Tuesday the draft of an apology was brought, which Sprigg refused to sign, because he had heard prisoner had written it; another was brought; understood to have been written by Mr Semmes, which he signed, and appeared glad to do so. Sprigg met prisoner afterwards at a second ball, and treated him kindly; deceased said prisoner had published the apology, as he had a right to do, but that he had appended a note which he could not stand; spoke of his intention to prepare a publication in response, denouncing prisoner as a coward and a liar, and that he would have no more to do with him, as he had acted so cowardly; that he laid aside his arms after the apology, considering the matter adjusted. Deceased had tears in his eyes when rehearsing the matter. Knew Dr. Moore; bore a good character for truth and morals.

Wm. Neal called.—Knew deceased for about twelve years; he was courageous, quiet, not a desperado; never heard his veracity questioned; not a malicious man.

Cross-examined.—Sprigg was quicker to take offence than men generally; no reputation as a quarrelsome man; he'd use any thing in a fight he could get hold on. On day of the shooting, was in the house where prisoner took his meals; he seemed greatly distressed; he invited me to dine with him; told him I boarded in the house; he asked me to take a seat beside him; did so; I made some remark to him at dinner, but he never answered it, or spoke at all.

By State.—Didn't think from what he had seen of Swan that he was insane; had heard of the difficulty, and thought it was occupying his mind.

Geo. Anderson recalled.—Knew deceased; he was high tem-

pered; would promptly resent an insult; didn't think him a dangerous man. Knew Dr. Moore; never heard any thing against him as a man of truth; would believe him on his oath.

Cross-examined.—Sprigg was quick; deceased rather stouter, more compact than the prisoner.

Charles A. Mudge called.—Was associated in the stage office with deceased; never heard of his being a dangerous man; he was of quick temper; never heard his veracity doubted; never heard of his carrying arms until the day of the spitting in prisoner's face; Dr. Dougherty asked me if I had pistols; showed him my single barrel pistols; went to his office; saw deceased, who said he heard prisoner was armed for him, with the intention to shoot him; deceased said he would not venture his life with single barrel pistols, and wanted a revolver; deceased weighed one hundred and thirty-eight pounds; saw deceased the morning after, and he said the matter had been settled, and could'n't talk about it; had been shown the letters deceased published, which he said he intended to vindicate himself against Swan's note; never heard him abuse prisoner.

James Evans called.—Knew deceased; was a good, clever fellow, generous, spirited; would promptly resent an insult, but not considered dangerous; knew Dr. Moore; never heard his veracity questioned; an honorable, high-minded man.

Cross-examined.—Deceased was quick to resent; use any thing to defend himself.

Wm. O. Sprigg, of Michael, called.—Was at the ball on the 22d January, as a chief manager; when about taking his wife home, Swan came out and told her what had happened during the ball; she asked him if he had apologized; he said he thought he had; she said probably Will might not have heard you; you'd better go and see him again; prisoner said he could not, for fear Will would strike him; witness was afterwards in the refreshment room, and saw Will and Dr. Scollay in earnest conversation; asked Will what was the difficulty between him and Bob; he was very excited; he said Bob had insulted him in the dance, and he believed intentionally; prisoner had been drinking and was also excited; told them if they raised any muss I would put them out; witness said he was a cousin of Will's, and married a daughter of Swan's mother-in-law; after the spitting, Will had tried to get a revolver of him, and putting him off, he said Dr. Dougherty had gone to get him one; said he must defend himself if attacked; after the settlement asked Will as to Ogle's advice. Witness censured him for the act; told him it was a wonder Bob had not blown his brains out; Will said, if he had, it would have served him perfectly right; but he thought the matter could have been settled but

for the advice of one or two pretended friends, and if a few others had let them alone.

The hour of one arrived, and the Court adjourned.

3 o'clock, P. M.

The court met.—Wm. O. Sprigg continued—He (Will) expressed regret at what he had done, and said he could never forgive himself. On the day of the killing, it was at the billiard room; prisoner was playing; about candle-light Will came in; stood near the table at which witness was playing; Mr. Cochran was jesting about Will's appearance, when he put his arms a'kinbo and straightened himself up; observed Will particularly for some time from having heard of his difficulty with prisoner; there was nothing menacing about him to prisoner; observed no embarrassment in prisoner's play; he was at another table; Will was pleasant, and witness dismissed all apprehension; Will had declined carrying arms, fearing in a passion he might use them; Will was about 30 or 33 years of age; prisoner about 24 or 26.

Horace Resley, called.—Knew deceased since 1843; rather impetuous, quick to resent an insult; never heard of his wearing pistols; was regarded as truthful; prisoner gave witness a printed circular about three days before the shooting; asked him if deceased had seen the postscript when he signed; said he thought not; that it was done to satisfy his friends in another part of the State; prisoner told him of the insult, of his getting pistols to shoot deceased; told of deceased going into Dougherty's to avoid him; of his invitation to the stable and into a room; of his challenging deceased to the meadow. Witness asked prisoner why he did not shoot when spit upon; he said he was taken by surprise, he didn't know what to do; witness told him he would have struck him; prisoner told him he was not able to fight him that way; then observed, that as both were pretty high mettled, he (witness) was very glad the matter was adjusted; he replied that it was a wonder he had not shot him down at the first meeting; prisoner left the printed apology with me, but gave no directions as to whether it was to be kept private; don't think he spoke harsh of deceased; don't think he mentioned deceased's having spoken of him in harsh terms. Nothing peculiar in prisoner's appearance; no indications of want of mental capacity at that time; not aware of any letter having been written in explanation.

James Sprigg called.—Heard of a difficulty between Swan and Sprigg, whilst at the ball; heard prisoner remark, "No, I'll be damned if I do; I'll die first;" he was talking with Dr. Scollay. On Saturday met Swan at a store; said he had heard of Will's threat to chastise him; advised prisoner to

apologise ; he said he would, but was afraid of a difficulty ; he said he had acted badly, but he meant no harm by it ; Doctor Scollay then came up, and he and prisoner, and myself, went to the hotel to dinner ; Barrell and prisoner left the table together ; soon after went out, when prisoner said deceased had spit in his face ; prisoner said he'd give a thousand dollars if Captain Archer was in town ; deceased was witnesses cousin, and did not like to interfere ; about 3 o'clock deceased called me over to Dr. Dougherty's office ; can't say whether he locked the door ; said he'd heard prisoner purposed to shoot him, and Dougherty had gone out to get him a pistol ; as we went to the door, on leaving, saw prisoner and Roman on corner of Baltimore and Seventh streets. Prisoner came over towards the doctor's office, and then came up to me ; can't say whether he tried the door ; said he had pistols—one for Will, and one for himself ; told him Will was waiting for a pistol ; he said, " Ah, I didn't know that."

I went to Keeler's store and proposed to him they ought to be arrested, to prevent a street fight ; we went in search of them ; later in the evening prisoner was in a billiard room, and Will was starting the coaches ; prisoner afterwards came in a great hurry, took Betts and Keeler in the back room ; thought it was settled ; saw prisoner next day, (Monday,) when he asked where he could find Mr. Roman ; invited him to dine with me, but he declined, saying he wanted to see Roman. On Monday, met Swan, told me if I saw Will to say there must have been some mistake as to the place of meeting ; next saw Will near the stage office ; prisoner had told me not to say any thing to him unless he first asked ; Will inquired what prisoner had said ; told him Swan had spoke about their meetings across the river ; said he had received a note from him, which either proved him to be a fool or a coward, and he would wait to see whether Swan was disposed to act manly, and spoke of the light manner in which the matter had been conducted and blamed some of Swan's friends.

On Tuesday morning saw Will, who asked me to go down to Dr. Dougherty's office ; that he and Dr. Scollay were about to settle it, and he was tired of it ; shortly after Dougherty brought a written apology for deceased to sign, but he refused, saying it was written by Swan ; said he was willing the Doctor might call in a third person, (naming Mr. Price and others,) and whatever was agreed upon he would sign ; told Dr. Dougherty to say to prisoner it must be settled at once, no matter how ; went with Dougherty to Scollay's office ; found prisoner there ; prisoner was told Will would not sign the apology ; when prisoner said he must sign that, for no other would

do; Dougherty asked if he should tell prisoner what Will had said; and told him he had said if not settled soon he would not receive an apology or a friend from him; to which Swan replied, "What, must there be a murder!" Dougherty said there was no necessity for that. I advised a settlement, and he said he would reserve the privilege of rejecting any draft of apology; told him he was safe in doing so, as neither of the gentlemen would do anything wrong; Swan said if he met Will unarmed, he'd fire his pistol in the air; met Dougherty in the evening, and he said the matter had been settled; saw deceased and Swan on Thursday following at the next ball; on Saturday Swan and deceased were at witness' mother's evening entertainment; can't say as to their conversing; they both appeared to enjoy themselves; Will left before Swan; some person spoke of a bottle in Will's overcoat pocket, in the entry hall and upon searching, found a pistol there; I hid it; didn't say he would not go home unarmed; he came next day, dined, and got his pistol; on next Thursday, 5th February, went with Will to his father's; when speaking about the apology, said Swan was a man of too much honor to abuse the apology; thinks he returned to Cumberland same night, and went again to his father's on Friday, and we all came to Cumberland on Saturday; heard of apology having been published; saw Will, and told him to keep quiet; on Tuesday morning, he came to me, asked me to carry a letter to Mr. Semmes; did say he was sorry to trouble him again, but he thought Swan had treated him very badly, but wished to take no advantage; he only wanted a plain, simple statement of facts from Mr. Semmes; went to Mr. Semmes, and he told me to call again; when he gave me a letter, which I took to Will, with which he seemed much pleased; didn't hear Will denounce Swan, but spoke in terms of regret, between the period of the insult and the apology. The prisoner is near twenty-six years of age; never heard or knew of the deceased carrying arms.

I. D. Richardson, recalled.—Conversing with Swan at the hotel after the difficulty, when deceased came up and invited us out to take a drink; they seemed friendly; saw deceased and prisoner again at an entertainment at Mrs. Sprigg's, (relation of deceased.) Thinks prisoner had said he carried his gun under his coat in passing Clabaugh, on his way to the hotel, where he shot Sprigg. Knew Sprigg's character—he was violent, but quick to forgive.

R. E. Hall called.—Knew Sprigg; never heard of his being bloodthirsty; he was quick; never heard his veracity doubted.

Cross-examined.—Lived only about one year and a half in Cumberland previous to the affair. Adjourned.

MONDAY, SEPTEMBER 26.

The Court met, and the State continued its rebutting testimony.

Dr. Everett, called.—Knew Wm. O. Sprigg; he was quick to resent an insult; never heard of his being a dangerous man, or that he carried weapons; never heard his character for truth questioned; knows Dr. Moore; never heard his veracity doubted; witness had seen prisoner shortly after being sent to jail; Swan said he had killed Sprigg, and deliberately; and that if it was to be gone through with again, he would not hesitate to do it over; said that the gun used had been loaded to meet Sprigg on the meadow; he seemed quite excited; he talked rational; said it was the result of something contained in a letter by Dr. Scolley, (the last paragraph;) witness, from his professional knowledge, did not consider prisoner insane when he was talking to him; regarded the excitement he was under as a natural result of the killing.

By defence.—Prisoner said the gun had been loaded by Capt. Thomas, with cartridges, bought by him for the purpose of fighting deceased, whom he had challenged. Deceased was quick in a quarrel, and prompt to resent an insult. Witness never entertained a particle of feeling against Swan; had, and now felt deep sympathy for him; had said that violated law should be vindicated; would feel sorry at prisoner's being executed; was absent at the time of the killing, attending the Legislature.

Orlando D. Robbins, called.—About a week after prisoner being in prison, visited him; told him it was reported that he was either crazy or drunk when he committed the deed; to which prisoner replied, that he was neither.

Wm. Weber, called.—Knew deceased; his character was that of being easily excited, and when so he might be called a violent man; to get into a quarrel with him would likely lead to a fight, as he would strike quick; he'd strike and readily make up; of a forgiving disposition; never heard his veracity questioned; knows Dr. Moore; his character for truth is good.

James W. Jones, called.—Saw two persons on the Mineral Bank steps on Sunday night; supposed it was deceased and prisoner; the night was very dark; about nine o'clock; had never said positively it was them; judged of them from their size.

By defence.—It was so dark could't tell whether the persons were white or black; had told Mr. Jorden, next morning, of having seen these two persons, whom I supposed to have been deceased and prisoner.

John Lingo, called.—Knew deceased; he was quick to resent an insult; never heard his character for veracity doubted, but a

man who would doubt his word had better be getting out of his way. Knows Dr. Moore; never heard his character for veracity doubted.

Dr. Dougherty, called.—Was at the ball on 22d January; did not see any difficulty between deceased and prisoner; saw deceased next Saturday; he said he had gotten himself into a scrape; asked me to act as his friend; said he had spit in prisoner's face, and some friend had told him prisoner had armed himself to shoot him; said, "you know I never carry arms, not even a penknife, and I wish you to get me a double barrellled pistol;" told him I would do so; took him into my office; I then locked the front door and went out the back door; Sprigg told me if I saw Henry Atchirson, to send him to him; whilst out, saw prisoner going up the street; witness watched him, saw him go into a barber's shop under Barnum's hotel, (kept by Heffelfinger;) got a single barreled pistol from Mr. Kennedy; showed it to deceased, who said it would'nt do; went out to get a revolver; went to Triber's store, who said Swan had been there, and borrowed one; went to Devecmon's store, and got one of Allen's revolvers; got buck shot at Norman Bruce's store; told Kennedy he'd procure a revolver, who said I could find powder at his office; loaded the pistol at Kennedy's, in presence of deceased, and gave it to him, telling him it was merely for defence. Deceased said he'd heard of prisoner's intention, and had "no idea of being shot down like a dog;" he said he had insulted prisoner, and he wanted him to challenge him, and "they'd fight it out in the usual way." Went up the street before deceased to see prisoner, and tell him deceased was armed; deceased said I could do so; saw deceased opposite my office as I went to it; crossed over to him, and we walked to the hotel together. A sleigh drove up, deceased having promised to take some ladies out, but he sent it off, saying he didn't want to leave town until he heard from prisoner; that if he challenged he wanted to be there to receive it; when seen again, soon after, deceased said some person had told him that Swan had put the matter in the hands of Mr. Roman for settlement. Witness afterwards got a sleigh, and deceased got in; deceased said he had seen prisoner, and the thing was likely to turn out ridiculously; it was before sun down; said he would tell all about it after returning; and when back, he said he had met prisoner, and seeing him coming up, deceased drew his pistol, and prisoner said, "My God, Will, don't shoot—I came to see if this thing could'nt be settled;" that he put up his pistol and went up stairs with him, when prisoner asked if he should say he did not intend to insult him at the ball what he'd do—to which deceased replied, "I will do anything any gentleman will say is right;"

thinks he said they then went and drank together. Did not see him again until Monday night, and then met him on the corner of Centre and Baltimore streets; deceased was alone, it was about 9 o'clock; was going to my office; Dr. Scollay came in about half an hour after. Sprigg was not there; Scollay enquired for deceased, told him likely find him at Norman Bruce's or Dr. Perry's; we found him at Perry's; arranged to have an interview with him at my office; told him for what we came; said he'd go up stairs to excuse himself to the ladies, to prevent alarm; met us at my office; he expressed regret at having spit in Swan's face; said he'd be satisfied with whatever we would do, but if not agreeing to terms, we might call on Mr. McKaig, Mr. Semmes, and Mr. Thurston, to prepare some plan of adjustment, reserving to himself the right to accept or reject whatever might be proposed; Dr. Scollay said he reserved a similar right for prisoner; it was understood that these reservations were right; there was an understanding as to the mode of giving apologies, as to which should make the first; deceased said the *last* insult must be first apologised for. Witness drew an apology; saw prisoner, told him he had seen deceased; prisoner flung the draft of apology aside, wrote one himself, part of which was in the original; prisoner directed that deceased should be told that he had written it, so as to relieve Scollay of the responsibility; went to hotel, found deceased was not there. Next morning told them I had not seen deceased; this was Tuesday morning, after breakfast found deceased with his cousin at my office; he refused to sign, and suggested referring it to the three gentlemen above named; showed him an apology I had drawn, and he said he would sign that without hesitation, and requested me to tell prisoner if he did not settle it promptly, as between the friends then acting, he would not receive another friend; said he was sorry for the insult, and that he wondered he didn't strike him at the time of the insult; went to Scollay's office, where Swan was walking the floor; told him that deceased would not sign it, and prisoner said "does he want me to commit murder;" he, deceased, objected to that portion of it, in which Swan claimed the right to do as he pleased with it; that he expected Swan to give him a written statement as to the ball-room affair; after dinner met Scollay, who showed an apology altered by Mr. Semmes; the objectionable part was still there, but said I should take it to deceased; did so, and deceased said he would not sign it whilst it was there, though he said it was a gross insult he'd given; saw prisoner again at Scollay's office, and prisoner said, "Will must sign it, for I'll take no other apology from him."

Witness suggested taking out the portion objected to; Mr. Geo. Neil came in, on business; after a while witness again

proposed erasing that part about the ball room affair, to which Scollay objected; witness asked Swan so to alter it, and he thought he could influence Sprigg to sign it; was asked to copy it, and see Sprigg soon, and pulled out his watch to see what time it was, giving the impression that he was under an engagement to go somewhere; took the apology to Sprigg, and advised him to sign it with the objectionable part in it, left him for a short time to think of it, whilst I attended to some business; upon retiring, Sprigg said he would sign it, provided, Swan would give him a written apology about the ball-room affair; told Sprigg that I had assurances from friends that Swan would do so; did not tell Swan of this, as Scollay said it was not official; Sprigg signed it, and said "I suppose the matter is settled now, and I am glad of it;" told him I was too; Sprigg expressed his gratitude for my action in the matter; we walked down the street, and I left him at the post office; met Swan going to the post office, and told him of the apology, and he asked me to go to Scollay's office; Swan came, told him, and he asked assurance of it's being unaltered; he said he had met Sprigg at the post office, but did not speak to him; Swan went out, and he and Sprigg met; can't say what was said between them, and returning, Swan sat down to write, what he said, was a letter to explain his conduct, to Sprigg; next saw him at dinner, and coming out, called Sprigg to him at the door, when he said Swan had published the apology, with a postscript holding him up to the world as a coward; Sprigg said he intended to publish him, and he should want a letter from me, explaining the matter; asked me to see Swan and get a copy of the publication, and seeing Swan, he asked me to go now and get it; Sprigg was much excited; said he had left it to his friends long enough, and Swan had put him in an ugly predicament; went to Swan, told him he had placed me in a bad position, in getting Sprigg to sign the apology; he said he would give me a written statement relieving me of all difficulty; told him it was too late, that Will had determined to make a publication, and told him I should be compelled to say the note was not true, when Swan remarked, he thought it was unnecessary for me to do so; told him his publication was wrong; he said he had done it under advice of several of the best heads about town; told him I did not care who they were, they had advised him wrong; he said he did not think so; asked him for a copy of the printed circular; said he had none about him, but, if I'd go to his office he'd give me one; afterwards went to Swan's office; he gave me a copy and showed me a rough copy of a challenge, as I suppose, for the purpose of convincing me he had sent a challenge—it was a long letter, and written on the

back "corrected by J. P. Roman; never heard from Sprigg that Swann had sent it; told Swan that Sprigg had paid no attention to his challenge; Swan went to post office with me; he showed me an unfinished letter, intended for Sprigg, explaining the ball room affair; witness gave Sprigg a rough copy of a statement of the affair on Wednesday; saw Swan on Wednesday, and told him of having given the letter to Sprigg, and that the note was pronounced untrue; Swan said I need not have done so, and he wanted to satisfy me he had been to the meadow to meet Sprigg; he said anybody who said he had attempted to withdraw the apology lied; never saw him in jail. Had met Sprigg; asked him if he had seen "that fellow," (meaning Swan) and he said he had not; meant no disrespect to Swan; it was on Wednesday, and never saw him again until dead. Had never seen or heard anything of Swan, that gave the impression of insanity.

By defence—Before the affair was considered adjusted, Swan was greatly excited; had acted with a view to adjust the difficulty, not considering duelling a test of courage; had never heard Sprigg speak harsh of Swan; had told Sprigg that Swan had backed out, when Sprigg said it had been settled and it did not become him to speak of the matter; did not mean that prisoner had backed out from the fact of his accepting an apology; but from his not resenting the insult at the time of being spit upon; when locking my office, whilst deceased was in there, I intended to go and see prisoner and tell him of having given deceased the revolver, and supposed that would do away with fears of a street fight; intended by locking the door to keep any and everybody out; and doing so had no idea of prisoner's coming there, but did so to keep deceased in; had no reason for believing that prisoner knew deceased was in my office; had been told that prisoner had been at the door; had told deceased that prisoner had gone into a barber shop and that he would probably shoot him through the window; prisoner said he had gone to the ground, but that deceased had not met him, and that if they had fought he would rather have been shot himself than to have killed deceased; thinks deceased never mentioned having received the challenge until Tuesday; did not think prisoner would fight; had assisted in getting prisoner out of the difficulty; had heard of prisoner's being engaged in a duel in Mexico, and of his having a difficulty with a Mr. Mercer, which was settled after challenge, and had formed an opinion of prisoner's courage; deceased never told me he had been told he ought to beg for his life; had no recollection of prisoner's saying the apology must be signed within an hour; prisoner did not say he had an engagement to attend to, when asking that the challenge might be signed. Adjourned.

3 o'clock, P. M.

The Court met.—Charles B. Thurston, called—Was in the billiard room on the afternoon of the night of the killing ; played a game with prisoner ; whilst playing, deceased came into the room, walked around, and entered into a loud laughing conversation with Dr. Cochran ; deceased remained in the room about fifteen minutes, and went out ; whilst there, Cochran was talking to deceased of his size ; left prisoner in the room ; afterwards heard of the shooting ; there was nothing in prisoner's conduct or manner different from what was common to him.—Saw nothing on the part of deceased indicating defiance or threatening. Deceased was quick to take offence ; impulsive, though not desperate ; would rely with the utmost confidence upon his word. Knows Dr. Moore ; never heard any doubt as to his veracity ; believed he bore a fair reputation ; had seen prisoner in jail, when he enquired after Mr. Sprigg's family, and expressed much sympathy for them.

By defence.—Never had any conversation with Kramer, taking sides as to the parties ; positive as to having left Swan in the billiard room.

The State here announced its having concluded its testimony.

The defence thereupon called its rebutting evidence.

Andrew J. Kennedy, recalled.—Capt. Thomas came to Cumberland on Wednesday or the day before the killing, and thinks he left that night. Witness went to Dr. Dougherty's office, when deceased said "come in and lock the door," saying that Swan had already been there ; deceased asked witness for a pistol ; cant say where Dougherty was then.

Mr. Price said the defence had concluded its testimony.

Mr. Harbine, State's Attorney, suggested the propriety of adjourning untill to-morrow, to allow counsel to arrange the mass of testimony, the better to subserve what was due alike to the State and the prisoner. There being seven counsel, and all probably anxious to speak, the policy of an adjournment would recommend itself to the sound discretion of the Court. Adj'd.

NOTE.—As Mr. Roman was deemed an important witness in the cause, he declined to participate in the arguments either before the Court or jury.

SPEECHES OF COUNSEL
IN THE CASE OF
STATE vs. ROBERT SWAN.

SEPTEMBER 27, 1853.

The Court having met, Mr. Harbine, prosecuting attorney for this County, announcing that since the adjournment of last evening, a witness early summoned in the case had arrived, asked that his testimony be admitted, (understood to be touching the sanity or insanity of the prisoner.) Mr. Price, on behalf of the defence, said two witnesses on that side had also arrived, and he should oppose the opening of the door for the admission of other testimony; or else, their evidence would be pressed for admission, and by the time of getting through with these witnesses others might arrive, and thus no one could tell when the testimony would be concluded. The Court declined opening the case for admission of additional testimony.

MR. HARBINE then commenced the argument before the jury upon the law and the testimony in the case:

He said that the Counsel who made the opening statement to the jury on the part of the defence, had spoken of the history of this case and charged the State with delaying the trial. Now, although this had nothing whatever to do with the issue the jury had sworn to try, yet being introduced, he would speak of the facts as they existed, since the removal of the case to this Court. He did not desire to speak of the causes of the removal, for his colleague, (Mr. Gordon) at whose instance it was done, would fully vindicate that act; nor yet did he propose to say aught in regard to the presence of his colleague from Baltimore City, (Mr. May) for he was yet to speak, and was able to satisfy the most skeptical as to the propriety of the course of the Executive, in commissioning him to assist in this prosecution. The Counsel for the State had not caused any delay in this Court.—At every term since the removal of the case from the Circuit Court for Allegany County, he had proffered to the prisoner, through his Counsel, a trial, and each time, except the last, they had refused.—Judge Merrick, who presided in Allegany County, was not authorized by law to act here, and filed his written declaration with the Clerk of this Court. Believing that Counsel were authorized by the act of Assembly of 1852, chapter 68, to appoint a proper person to preside, he had twice prior to the November term, 1852, and once at that term, asked the Attornies on the other side to agree with him in the appointment of a Judge. They refused. Again, at March Court, 1853, he made them the same proposition, and again they refused. The power to notify the Judge of the adjoining circuit of the inabil-

ity of Counsel to agree upon a proper person to preside, as provided by the act of Assembly referred to, did not arise until the last named term, when the notice was given, and the services of his Honor Judge Tyson were procured, but not in time for that Court. The case then stood for trial at last July term, when by agreement of Counsel on both sides, this time was assigned for taking it up. From these facts it would appear that the State is not justly chargeable with delaying the trial. Had the prisoner consented to the appointment of a Judge, it would have taken place at November term, 1852, or March term, 1853. If, then, the witnesses for the prisoner had scattered far and wide, and he had been prejudiced in any manner by the delay, the simple and conclusive answer was that it was his own fault. The Counsel on the other side contended that the act of Assembly referred to gave them no further power to agree—that having agreed in Allegany County to the appointment of Judge Merrick, that power was exhausted. He did not think so. This was a new case in the Circuit Court of this County, and as such the same power that existed there to agree exists here. If, however, that power was exhausted, surely the Counsel for the State could not justly be charged with delaying the trial. It was not in their power to make the law, or to alter it, and it was certain that so soon as the contingency happened authorizing the appointment of a proper person to sit in the case, by the judge of the adjoining circuit, he was called upon to act, and did act.

The prisoner was indicted for murder in the first degree. To that indictment he had pleaded not guilty, and the jury were to try the issue. They must understand that the issue joined was not confined to murder in the first degree, but equally related to murder in the second degree, and manslaughter, either of which they could find, according to their views of the evidence. In the progress of this trial much had been said about the jury being exclusive judges of the law in criminal cases, and in support of that view section 5, of article 10, of the new constitution of Maryland had been cited. That section only affirmed what was the law before. The jury had no new powers given by it, but were acting with the same power as other juries had in criminal cases both before and since the adoption of the new constitution. They could judge of the law of the crime, and decide what facts amounted to murder in the first or second degree, or manslaughter, but at the same time they must remember and confine themselves to the law as it is, for they could set up no other rule or standard in its place. They were not law-makers, and therefore all that was said by the defence about the code of honor, and the proof they offered from a gentleman distinguished in the army, in regard to the principles of that code, was entirely irrelevant. At best it was but an arbitrary standard that each person set up for himself. Duelling was part of that code, yet so far was it from being recognized as law, that he who killed another in a duel at common law was guilty

of murder, while in addition to the severe penalties of our Statute, according to the 36th section of the 3rd article of the new Constitution of this State, any person who fought a duel, or sent or accepted a challenge to do so, was rendered incapable of holding any office of trust or profit under the laws of Maryland. He would say to the jury in the language of Judge Parker when delivering his charge at the trial of Selfridge's case, that these were "principles which you as jurors cannot recognize. The laws you are sworn to administer are not founded on them. Let those who choose such principles for their guidance erect a court for the trial of points and principles of honor, but let the courts of law adhere to those principles which are laid down in the books and whose wisdom ages of experience have sanctioned." Nor yet had the jury any right to decide this case by the verdict in Stump's case, or Mercer's case, or Myers' case, or Seiders' case, or of any of the other cases named by the Counsel who called these cases the common law of this country, and argued that the jury should be bound by them. How was it possible for them to be a guide for the jury when they had not the data upon which they were decided? They could not, therefore, tell what facts had influenced the minds of the jurors in determining these cases. But besides this the cases themselves differed widely. They established no rule, and if juries followed them the law would be most arbitrary, uncertain and unjust. Such doctrine might do for the advocates of "higher law" or no law, but sworn jurors must look to the law of crime as established by the Legislature of Maryland and by the common law of England in force here. They could make no exception of this case. That law was simple and easily understood. The 3rd section of the act of 1809, chapter 138, after enumerating particular cases, declared that any murder which shall be committed "by any kind of wilful, deliberate and premeditated killing" was murder in the first degree, "and all other kind of murder shall be deemed murder in the second degree," while the Statute did not define manslaughter, which therefore remained as at common law.—The difference between murder in the first and second degree lies in the intent with which the act was done. When one person killed another with a deliberate and premeditated intention of taking life, it was murder in the first degree, but if death ensued from such an intention of doing great bodily harm or injury only, then it was murder in the second degree. Manslaughter differed from murder principally because there was no malice in that crime. It was defined to be the "unlawful killing of another without malice either express or implied." Bearing in mind these distinctions between the general grades of homicide, the question for the jury to determine was, do the facts in this case come within any of them, and if so, of which? He had said that the prisoner was indicted for murder in the first degree, and thought the facts and law would show him to be guilty of that crime. To make good that position it was necessary to show

in the language of the act of Assembly that the killing was "wilful, deliberate and premeditated."

He would first address himself to this enquiry, was the killing in this instance wilful?

In the absence of all proof of coercion that would be the legal presumption. The manner of killing, the weapon, the destructive load in it, and the discharge of the second barrel of the gun after the first had failed to take effect, all proved that it was intentional and wilful. To these facts might be added the prisoner's declarations to Stewart, to Callan, to Somercamp and Gephart that he "came to shoot and did shoot him," and that he "intended to do it, and did do it." But the Counsel for the defence had alleged that at the time of the killing the prisoner's mind had given way,—that he was then governed by an irresistible and uncontrollable impulse,—was not a voluntary agent, and if so, the killing was not wilful and he was not punishable. He would examine their plea of insanity. Where that plea had been successful the jury would generally find proof that the prisoner had previously been in bad health,—was subject to epilepsy or some other disease conducing to insanity. But few cases were on record where its existence had not been traced in the subject long anterior to the commission of the act, or had not perhaps in generations gone by existed in the blood kin of his family. No such fact had been shown in this instance, and he had a right to infer that had any existed, the able Counsel for the defence would have made it part of their case. If true, this was a most strange case of insanity. No symptoms of that disease were shown to exist until a few days before the horrid deed was done, and after that it disappeared entirely. Was it not wonderful that the mind had left its moorings for so short a time, and since had been sane as ever? Yet such was the case.

He read sections 372-73 of the 2nd volume of Greenleaf's Evidence, and section 5, note 4, of the 3rd volume, and contended that they most clearly expounded this subject. From these authorities he would deduce the following legal principles:

First. The barbarity of a deed afforded no presumption of insanity. If, indeed, that were proof, few could be convicted of the highest grade of crime. That principle disposes of Cutter's testimony, who gave as a reason for supposing the prisoner insane, that no sane person would commit such a crime.

Second. The burden of proof, when that plea was set up, lies on the defence, and unless the jury were satisfied of the sufficiency of the proof to establish the insanity, they were not to regard it.

Third. The jury must believe the prisoner insane *at the time the act was done*.

To show that, evidence of his insanity before the act is admissible, for if it is once proven to exist, the law presumes its continuance, but evidence after the act should have little or no weight, for it may be simulated, or be caused by the crime itself. Hence the proof of

the desire of the prisoner to sleep, his thirst, his vomiting, all which occurred in the Justice's office when he was about being committed to Jail, were entitled to no consideration. These acts were but the effect of the excitement caused by the killing, and were not by any means evidence of the cause that led to the perpetration of the deed. By the testimony of the physicians examined, they could be caused by a high degree of excitement. That was a natural and proximate cause, and to it, and not to insanity, ought they to be attributed. The jury would remember the intense excitement that immediately followed this lamentable tragedy, and it was not going too far to say that the prisoner, who beheld his victim dead before him, should have become so much excited that after it began to subside, and his system relaxed, the causes detailed naturally followed.

Fourth. To excuse crime on the ground of insanity, the prisoner must not be able to distinguish right from wrong, with reference to the act done.

The question then for the jury to determine under this plea was, did the prisoner at the time of the commission of the offence charged, know that he was doing wrong? The insanity must go to that extent which he thought the proof was very far from doing. There was testimony to show that he was troubled, melancholy, in apparent doubt what to do, would become excited when talking of his difficulties with the deceased, and sometimes neglected speaking to an acquaintance whom he met. But that did not make out a case. Who had not thus acted when troubled or deeply absorbed in thought? If such proof was sufficient, half of the community were insane. It was true that two physicians had given it as their opinion, that from the evidence in the cause, they did not think the prisoner at the time he done the act capable of distinguishing right from wrong. But some, perhaps the strongest proof that went to make up that opinion, occurred after the killing, and therefore ought not to have been considered. Exclude it, and we have a right to suppose their opinions would be different. On the contrary the State had proven sanity by the previous acts, as well as by witnesses, equally respectable and reliable with those of the defence, and with equal opportunities of observation. This proof began with his letters to Judge Perry on the 7th of February, continued day by day, until the night of the 11th, when the deed was committed, and ended with his confinement in the Jail of Allegany County. Seymour proves that one or two days before the killing the prisoner transacted business as usual.—Thurston was playing billiards with him only about half an hour before the fatal deed, and said he played his ordinary game, and seemed as pleasant as usual. When on the hunt of the deceased, he concealed his gun from a gentleman he met, and again when he looked into the billiard room. The man who does not know right from wrong would not conceal the weapon by which he expected to commit such an act. He was aware that much of the State's evidence

on this question was of a negative character, but if the parties had equal opportunities of seeing a state of mind asserted to exist, and did not see it, there was room to doubt the correctness of that assertion. However, the State had produced affirmative proof that Swan knew he was doing wrong when he killed the deceased. To three witnesses, immediately after the deed was committed, and without their solicitation, he spoke of delivering himself up to the officers.— Now why propose to do so unless conscious that he had violated the law and done wrong? The man who was not aware of the moral quality of his actions would certainly not condemn himself. To another witness who said, “send for an officer,” the prisoner replied, “that is right, send for a Judge, Constable, or who you choose, I am here.” Why was it right in his opinion, if he did not know right from wrong? Nor in this connexion was the exclamation of the prisoner to one of the children of Judge Perry to be forgotten. It was on the same night, and shortly after the perpetration of the homicide. He had united with them in prayer, and when it was over said to one of them, “Oh! Sally, you will think well of me if no one else in the world does.” Was not that language directed to the act he had just committed, and did it not refer to the condemnation of the world that would be visited upon him, and thus proved that he was conscious of the moral quality of that fatal deed.

Having then shown that the prisoner was not insane, and that the homicide was wilful, he would proceed next to prove that it was “deliberate and premeditated.”

The words “deliberate and premeditated” went far towards making up our Statute definition of murder in the first degree. Without them the homicide would only amount to manslaughter. But though it was essential that the killing, to become murder in the first degree, must be characterized by both, yet it was established that “the length of time between the design formed and its execution is immaterial.” Wharton’s cr. law, 435. It had, therefore, been said by the learned author just quoted “that if the party killing had time to think, and did intend to kill for a minute as well as an hour or a day, it is deliberate, wilful and premeditated killing, constituting murder in the first degree.” This was the legal meaning of these words in our Statute. Was then this homicide deliberate and premeditated?

Cramer testified that almost half an hour elapsed from the time Swan left the billiard room until his return, and during this time he walked about three quarters of a mile to get his gun from his office. Now it was clear to his mind that the prisoner had determined upon his course before leaving that room, and during the intervening time was deliberating upon it. To two of the witnesses he declared at different times, that “he had made up his mind to kill him.”— What stronger language could be used to express deliberation and premeditation? “Made up his mind” certainly means that he had reflected and came to a deliberate conclusion before acting in the prem-

ises. To another witness he said "he had shot the deceased, came to shoot him, and did shoot him." Why come to shoot him unless it was pre-determined and considered beforehand? To another witness he said, that he never determined to kill him until the day he did.—One day before the commission of the offence he said to Scollay that "if the publication went on Sprigg would seal his own fate." The day before that he declared, that if a publication was made of the character he had understood it would be, it would make him desperate, and force him to attack the deceased. These threats clearly showed his determination, at least one or two days before the fatal deed. They were hypothetical, it is true, but that did not make the act less deliberate and premeditated. When the prisoner knew that the publication would be issued from the press, he acted like a person who had made up his mind to revenge himself. The jury would remember his conduct at Roman's office on the 11th of February. He sat there and said nothing for several hours. His mind was then busied in the scheme so fatally carried out on that night. He then spoke of his kind feeling for the family of the father of the deceased,—referred to his relations in Hagerstown, and deprecated the effect any further difficulty with the deceased would have in breaking those relations, and alienating the Sprigg family from him, yet concluded by saying that the deceased was going to make his publication, and he was degraded any how. On the afternoon of the same day he told Roman that the publication would be out the next morning, and was then in type, and left him under the impression that he was going to seek a street fight with the deceased. From that evidence it was easy to trace the workings of the prisoner's mind. He had declared that the publication would seal Sprigg's fate, and now knowing when it would appear, he was weighing matters pro and con. On the one side he did not wish to incur the displeasure of those he respected and the one he loved, on the other was passion goading him on to revenge. Thus stood the scale in equal poise, until he bethought himself that the deceased had already degraded him, and then his mind was no longer in doubt, but determination fixed and fatal was his.—Did not this weighing of matters, this arguing within himself, prove deliberation and premeditation? The prisoner's declarations while in Jail sustained this position. To Everett, who visited him while there, he said he had killed the deceased deliberately, and under the same circumstances would do it again. To the same witness and Moore, who seen him there at different times, he said he had killed the accused because of the winding-up paragraph of Scollay's letter. The part of the letter he alluded to was that he (Scollay) did not regard the apology as having been written in answer to the challenge addressed by the prisoner to the deceased. That was in conflict with the note appended by the prisoner to the printed apology or circular, which stated that the apology was in answer to the challenge. Now this letter which called in question the correctness of the priso-

ner's note to the circular, was shown to him by the author one day at least before the murder, and he desired something to be added to it. That was refused. The prisoner was then left to reflect on the position that letter and Dougherties' would place him in before the community, and no doubt in accordance with his threat, resolved upon the course he afterwards pursued. Knowing then that the publication would be out in the newspaper the next morning, and true to his deliberately formed and pre-determined purpose, that night he killed the deceased.

Having established this to be a case of murder in the first degree by showing that it was "wilful, deliberate and premeditated," he would proceed to inquire if there were any facts in the case that under the well-known principles of law would reduce the grade of the crime. It was well established by the best writers upon criminal law, that no words of reproach, how grievous soever they may be, or indecent, provoking actions, or gestures expressive of contempt or reproach, without an assault upon the person, will free the party killing from the guilt of murder, if he used a deadly weapon. He read from Wharton's cr. law 368, 3rd Greenleaf's Evidence, sections 122-24. In this case a deadly weapon had been used, and there was no provocation to the fell deed but words. The fact that the statement of the deceased had been published did not take the case out of that legal principle, for the law recognized no difference between words printed or spoken. Nothing short of an assault would mitigate or reduce the offence. The parties, after the publication of the prisoner's note, had met at Cowton's Hotel, and at the billiard room, on each of which occasions there was ample opportunity for Sprigg to attack him, but no witness had testified that there was even a desire manifested, much less an assault made on him.

The prisoner had, however, been twice assaulted by the deceased. The first time it occurred in the Assembly Room, on the night of the 22d of January, the other time was when his face was spit upon, on the 24th of the same month. But neither of these could, under the law, constitute the provocation that led to the fatal catastrophe. No principle was better established by the books, than, if between the provocation received, no matter how great it may have been, and the mortal blow given, there was sufficient time for passion to subside and reason to interpose, and the person provoked afterwards killed, it was murder in the first degree. He cited Wharton's cr. law, 375-7-8, 3rd Greenleaf's Evidence, 125, 4th Blackstone, 191. Now from the first assault to the night of the killing, it was twenty days, and from the second assault it was eighteen days. Was not that sufficient cooling time? Could there be a doubt upon that point, when in this long interval the prisoner in very many ways must have had his attention called to other subjects?

But not only was there time to cool, but the prisoner did cool between these assaults and the killing. Scollay testified that the apolo-

gy was by both parties considered a full settlement of the difficulties existing between them. The jury would remember the gratification expressed by Swan at the reception of the apology, as testified to by Kennedy, and that he went and met Sprigg, and they shook hands together, as proven by Dougherty. Now this apology was given on the 27th of January, or two days after the last assault, and was for the very purpose of atoning for that gross outrage. Two days after that apology was given there was another assembly at which the parties met, and at Sprigg's request danced opposite each other in the same cotillion, drank together, and acted as sincere friends. Two more days pass and they are again found at another party together, and enjoying themselves in the same social circle. Here then beyond doubt was a reconciliation between the prisoner and the deceased. The blood had cooled. The insults of the past, though never so grievous, were blotted out, and enemies became friends. Therefore to kill for an assault happening anterior, would be the highest grade of homicide, if done as this was, with the deliberate purpose of taking life.

There were two disputes or difficulties between these parties, to one or the other of which belonged all the facts pertinent to this case. The first originated at the assembly, on the night of the 24th of January; the second was caused by the printed circular, consisting of the apology, with the note of the prisoner appended. In both instances Swan was the originator, and was in fault. That assembly found them friends. The prisoner interfered with the dance after his partner had taken her seat, and that gave rise to the first difficulty. What right had he to act thus? Had he taken his seat as he ought, they would doubtless have been on good terms to this hour. For that conduct Sprigg spit in his face, was challenged, and after an interview, the friends of the parties came forward, and an amicable settlement of their difficulties was effected, the deceased giving to the prisoner an humble apology. Their past difficulties settled, they were friends again, and attended the same convivial parties, and joined the same merry dance. Who was the first again to break these relations? It was the prisoner. He did it by publishing the note appended to the printed apology. That note in effect called the deceased a coward, and was inconsistent with the terms of the apology. It was just cause for his indignation, and induced him to make the publication that led to his death. He had a right to vindicate himself from the aspersion of that note. It was true, that the prisoner sought an interview, and sent him word that he did not intend to call his bravery in question. But he had given out copies of that circular, where that explanation could never reach, and even after he was told of its objectionable feature, gave Ressler a copy. How otherwise than by a publication could he correct the impression drawn from the printed circular, which had been scattered where and to whom the deceased knew not?

Thus twice were they friends and twice became enemies by the acts of the prisoner, and if the deceased retorted upon him with great severity, the latter should ever have remembered that his own conduct gave rise to it all.

The State had most fully proved its case, and he would say no more.

Mr. Gordon, prosecuting attorney of Allegany followed. He referred to the extraordinary circumstances attending this cause, from its commencement to its being ultimately brought to trial; defended the Governor in his course in regard to the case, as a duty imposed upon him under the Constitution; referred to the act of the Legislature of April 1st, 1852, providing for the disqualification of judges, and the selection of special judges to try causes, and said that the distinguished gentleman (Mr. May) appointed to aid in the prosecution, had been chosen upon his (Mr. Gordon's) direct request and recommendation. This, he said, he felt called upon to say in answer to remarks contained in the opening address by the counsel for the defence. He then went into a review of the testimony, and after speaking about an hour, the Court took a recess from about 1 to 3 o'clock.

The Court again met. Mr. Gordon continued his argument before the jury, and spoke until the hour (6 o'clock) of adjournment.

SEPTEMBER 28, 1853.

The argument in this case, on the part of the defence, was commenced this morning before the jury by Mr. Pearre:

He said that though his client was here among strangers, his character unknown to the jury, and the jury unknown to him, yet he felt no apprehensions on that account. He was sure that the same honorable sentiments that animated the breasts of the juries of Allegany, beat in the hearts of the men of Washington County, and that the avenues to their hearts were the same as to those among whom the prisoner at the bar had been brought up. He knew that the very fact that the prisoner had thrown himself with generous confidence upon the purity and integrity of a Washington County jury, would lead them to extend to him more than ordinary sympathy, in the trying position in which he now stood. The sentiment that "stranger is a holy name," was one that would touch a chord that would vibrate to the heart of every juror.

But, while the jury knew that the prisoner was satisfied that they had given and would continue to give to the end, his case a fair and impartial hearing, he desired it to be distinctly understood that it was not by the prisoner's act that the case was not tried in Allegany, where the tragedy occurred; that he did not shun a trial among those who knew him and knew the deceased, and knew the characters of each of them, and of the witnesses on both sides; that the State of Maryland and not the prisoner had removed the trial here. That inasmuch as the attorney for the State (Mr. Gordon) had seen fit to give his version of the occurrences in Allegany, before its removal to this

County, he would be indulged for noticing some errors into which he had fallen, and stating some facts altogether omitted. Mr. Pearre here went into a statement of facts, showing

1st. That the attorneys for the State had, in Allegany, endeavored to establish the doctrine that a juror was a competent juror, who had made up his mind that the prisoner was guilty, if he would say that he had not come to that conclusion out of malice to the prisoner, and to establish that doctrine, one of the State's counsel (Mr. May) came to Allegany armed with a volume of New Jersey reports, from the Library of Congress, to establish a doctrine that would put twelve men, whose minds were made up against the prisoner, into the jury-box as his judges.

2d. That with a view to prevent two jurors upon the regular panel from serving upon the jury, the attorney for the State, the day before the panelling of the jury commenced, had them summoned as witnesses for the State, and when interrogated by the counsel for the prisoner whether these jurors were really expected to be made witnesses, would not upon their honors say they expected to examine them as witnesses; that when one of these jurors was called to the book, he was objected to because he was summoned as a witness.—The Court decided he was a competent juror though he might be expected to be a witness. He was then sworn on his voir dire, and qualified himself as a juror. The State then objected to him for favor, and at its instance triors were appointed by the Court, and the juror was declared competent, and sworn.

3rd. That the counsel for the prisoner warned the counsel for the State, that if the case was removed to Washington County, there would be no Judge to try it, but they still persisted in its removal, and when we came to this Court in November term, then the counsel for the State admitted, as we had predicted, that there would be no Judge to try it.

But the counsel for the State made the affidavit, and the cause was removed

Mr. Pearre then went fully into the law of this State as applicable to this case, and contended that the several grades of homicide, as defined in the English books, had not the same definitions in Maryland.

Murder in England was a general word, the punishment for which was death in all cases.

That the people of Maryland, seeing the impropriety of awarding the punishment to all sorts of cases, classed by the Judges in England under the general term of murder, had as early as 1809 by legislative enactment, divided the term "murder" into two different degrees, awarding different punishments; making deliberate, wilful and premeditated killing, and killing which occurs in the perpetration of certain specified felonies, murder of the first degree, and all other kinds of killing, murder of the second degree,

In England if a man was doing a felonious act, and *accidentally* killed another, it was punished by hanging.

This is not so in Maryland. He cited 4 Blackstone for the definition of Murder in England—the killing of a reasonable creature, with malice aforethought, *express* or *implied*.

That malice was *implied* in England in cases where the killing was accidental, if the slayer at the time was engaged in any felonious act. That in Maryland nothing short of cases where there is *express* malice can be murder in the first degree.

He further cited 4 Blackstone to show that express malice is only shown by proof of “antecedent grudges,” “former menaces,” or a fixed design to take away life.

He said the State in its opening had promised to prove threats, and then analyzed the testimony to show it had signally failed. As to former grudges, the only proof upon the subject, the testimony of Mrs. Bruce, shew that in the mind of Sprigg alone was there any former grudge, as he had declared to Mrs. Bruce the existence of such a thing, and when she mentioned it to Swan, he declared he knew nothing of any old grudge, or the reason for any: he had none—Sprigg alone must have had it.

And that there was no proof to show any fixed intent or any intent in Swan to take Sprigg's life.

He further contended that Swan's whole character, as testified to by every witness upon the stand—civil, amiable, gentlemanly and polite to all classes, was conclusive proof that he was not a man to conceive or bear malice—that his entire conduct in the whole affair shew how anxious he was to avoid difficulty with Sprigg—his declarations made over and over again, that if they had met on the ground under the challenge given by Swan, he would draw Sprigg's fire and shoot his gun into the air—that he would rather Sprigg would kill him than be Sprigg.

That so far from the *State* proving malice in the part of Swan, the whole evidence in the case negatived malice and shew it did *not* exist, and that in place of malice, Swan had the most kindly feelings.

The malice was on the part of Sprigg, for by the testimony of Ainsworth, Kennedy and Barrell it is proved that Sprigg at the time he spit in Swan's face, intended, if Swan offered the slightest resistance for the insult, to have cut him down with a bowie-knife with which he had armed himself, and with which he declared he meant to kill Swan if he raised his finger when he spit in his face—and that he spit in his face with a view to make Swan resent it on the spot, that he might “cut his heart out.”

There being no evidence of express malice, there is no murder in the first degree.

Then as to murder in the second degree. It might be admitted that some of the cases where in England malice would be implied, might be murder in the second degree.

But malice cannot be *implied*, except in cases where there is a total absence of testimony as to intent and malice ; but where, as in this case, there is strict positive testimony negating all manner of malice, it cannot be implied. There can be no implication where there is express proof to the contrary. Implication is made in the absence of proof.

We then come to manslaughter. What is manslaughter in England is not manslaughter in Maryland. The punishment is totally different. In England the punishment ranged from death down to the smallest fine, In Maryland there is but one punishment for manslaughter—confinement in the Penitentiary.

Now in England if the husband slew him whom he caught in adultery with his wife, it was manslaughter, and the Judges ordered the punishment to be a slight burning on the hand, on account of the great provocation.

Is it law in Maryland that for such an offence a man must go to the penitentiary? Surely not; otherwise the punishment here would be more severe than in the blood-stained code of England. The result must therefore be that the term manslaughter as known and understood at the time of the passage of the act of 1809, was not understood or intended to include many acts deemed manslaughter in England.

Who would dare to say in the face of a Maryland jury that to kill a man caught in the act of adultery with a wife, would subject a man to imprisonment in the penitentiary; perhaps for ten years?

We are told by the counsel on the part of the State, that the Pennsylvania, Virginia and New Jersey statutes are similar to our act of 1809, and that the decisions of the Courts in those States are binding authority to guide a Maryland jury in construing our own act in relation to what particular facts constitute one or the other grade of homicide.

Upon an examination of these statutes, they are totally dissimilar from the Maryland acts. In those States manslaughter is divided into voluntary and involuntary manslaughter, and the punishment graduated according to the class of manslaughter to which it belongs. Involuntary manslaughter is punished in some cases as a misdemeanor, by a fine. Now in Maryland there is but one punishment for manslaughter, voluntary or involuntary—confinement in the penitentiary. Therefore it never was the intention of the Maryland Legislature to punish so heavily that which in our sister States is punished so lightly. The conclusion is therefore irresistible, that where they used the term manslaughter in the Maryland act, it was not intended to embrace all such cases as in those States would be termed manslaughter. The terms have a different meaning in the two States.

Mr. Pearre contended that there was a common law in Maryland, and indeed throughout this entire Republic, which from the origin of the government to the present day, has been growing, and which

common law, so far as Maryland was concerned, has been created and settled by the verdicts of juries.

Every lawyer in Maryland knows that even before the adoption of the new constitution, that the juries were the judges of the law as well as of the facts in criminal cases, and by innumerable cases it had been settled as the common law of the State, that in certain cases where the party slain had done an irreparable injury to the slayer, for which the laws of the land gave no redress, or could from the very nature of the thing, give no redress, that in such cases a man may redress himself.

Mr. Pearre said he referred to such cases as these—where a party seduces and commits adultery with another's wife—or seduces his daughter or sister—or uses means purposely intended to degrade and disgrace another, to take away his character among his fellow men, and render him forever after a useless member of society.

The common law of a country is nothing more than the opinions of Judges, delivered from time to time upon cases coming before them, and where by law they are entitled to give opinions upon the facts stated hypothetically.

In England, in criminal cases, the practice was very common for the juries to find, in a short mode, certain facts, and the Court would then declare the degree of the crime. But in this State, from its earliest settlement, the Court never undertook to charge a jury, and in doing so, to define what would constitute one or the other degrees of homicide.

The jury being judges of the law as well as of the fact, their verdicts in such cases as those I have mentioned, have given a common law of this State, applicable to all cases—have defined the law of such cases, and exempted them from the penalties of the statute.

This common law has been established by the constant and unvarying opinions of juries, as evidenced by their verdicts, as rendered in all cases coming within their principles; and being, in criminal cases, *judges* of the law, their verdicts are the opinions of judges on the cases decided by them, and such opinions have settled the law. To discover what these opinions are, it is only necessary to know the facts in the case and the verdict of the jury.

This was the common law of the State even before the act of 1809, and therefore it may be fairly presumed that that act was passed with a full knowledge that such was the existing law of the State, and that the act of 1809 would not be construed by the juries as abrogating the common law.

For instance, could it be for one moment contended, that the Legislature by the act of 1809 meant to inflict upon him who should slay another caught in the act of adultery with his wife, so severe a punishment as confinement in the penitentiary, for, it might be, ten years; and yet this offence is manslaughter in England, if the gentlemen who represent the State are correct—that manslaughter in England is man-

slaughter in Maryland—such must be the punishment here, though in England the slayer would only have been burnt slightly in the hand.

In criminal cases it is most fit that the jury should be the judges of the law as well as the fact, in a country where the juries are men of intelligence, having and feeling a deep interest in the good order and peace of society.

They hear the facts of each case—they know the respective penalties to be affixed to each grade of homicide or other offence, and they render such a verdict as will impose upon the offender a punishment proportioned to the offence he has committed.

The learned counsel for the State declare to the jury that if A spits in B's face and B slays him on the spot, that in England and Maryland it would be manslaughter. Where is the man who is bold enough to stand up before twelve spirited and high-minded men and solemnly contend that such is the law of Maryland. No sir; the law of this State will never punish a man who slays him who with malice aforethought attempts to degrade him. If a man attempts to chastise you or to punish you, it is nothing if done with an instrument or in a manner by which your life could not be endangered—you would not be fully justified in taking his life; but when he comes to spit in your face, with the fixed purpose to degrade and disgrace you, your honor is your life, and that life you may defend.

We are told that if a father or a brother slays the seducer of his daughter or sister, that this is murder by the common law of England and by the law of Maryland. The cold-blooded reason assigned in the English law-books is, that the killing is not done in self-defence, or in defence of one's house or family—and that such provocation cannot reduce the killing below the crime of murder.

Such is not the law of Maryland—such is not the law of any other State in this Union where twelve free American citizens in a jury-box have a chance to decide upon the law.

See the case of Stump, who killed Hammond for the seduction of his sister, and who killed him after lying in wait for him. He was acquitted.

Look at the case of Myers, who killed Hoyt, in Richmond, for the seduction of his wife, calmly, and for a long space after the knowledge of the fact came to his ears. He was acquitted.

See the case of Mercer, who slew the seducer of his sister, in Philadelphia. He was acquitted.

The case of Wise, in Missouri, who slew the seducer of his wife—followed him to Palmyra, and killed him on the porch of the hotel. He was acquitted.

There was also a similar case in Indiana.

Then there is the case of the young girl in Wisconsin, who was seduced by a man under promise of marriage, and who wrote to him after she was enciente, time and again, and begged him to repair the injury he had done her by an honorable marriage. When she found all her letters of no avail, and having no father or brother to

avenge her wrongs, deliberately provided herself with a pistol, had it loaded, went out upon the street, walked up behind her destroyer while looking into a shop-window, and shot him dead. The jury that tried her refused to convict her.

There are hundreds of similar cases all over the country, which have established a common law, administered by juries in such cases, for the benefit of society.

A man may defend his body from an assault, and yet he may not defend his honor. The casket that holds the jewel of his honor he may defend, but the jewel itself he dare not.

This is not law in this land.

The argument on behalf of the defence was continued by Mr. Spencer, who said:—

This is a prosecution for murder, a crime which is attributed to unmitigated malice—the most marked passion of the human heart.—The first fact that strikes us as remarkable in such a case, is the generous, amiable and forbearing character of the accused—a character not only proved by his general reputation and deportment, with all classes of men—but conspicuously shown by the facts and history of this case. It is proved by the tender interest he discovered in the sister, brother and other members of the family of the deceased.—Young, generous, sentimental and brave, with the fragrance of the highest sensibility around him—with continual anxiety to appease his adversary, he seems never to have forgotten that “a soft answer turneth away wrath,” and never was betrayed into the expression of a resentful thought. Hear his kind and pathetic words to Kennedy, after he had committed the fatal act—“*Go and see the last of poor Will.*” See the bitter tears of anguish streaming from his eyes.—When a brave man weeps, terrible are the emotions of the soul. See him in the room with his step-mother and the little children, at the hour of prayer, before they knew what he had done, kneeling with the children at the bed-side, making himself a little child in the presence of his God, praying and weeping bitter tears of regret. With a kind of involuntary inspiration, he was doing what God says is needful to pardon—“Unless ye be as one of these little children ye shall in no wise enter the kingdom of Heaven.” Let no profane voice violate the sanctity of those prayers and tears—they were for God—let God judge. But, gentlemen, it was not the spirit of a murderer that brought Swan upon his knees, with those children, and wrung the tears from his eyes.

Mr. Spencer here reviewed the testimony of Dr. Dougherty and Mr. Willison, for the purpose of showing its inconsistent and irreconcilable character, and as illustrative of the whole evidence on the part of the State, and proceeded:

Let us now take up the incidents of this unhappy tragedy. We begin at the ball-room. Who there was the aggrieved party? Suppose Swan, in the jollity of the moment, did turn Sprigg's partner?

did so trifling an act justify the violent rudeness of Sprigg; his seizing the person of Swan, jerking him violently around in the presence of the company, and his rude, menacing nods, as testified to by Mr. Clabaugh? Sprigg said afterwards to Kennedy that he should have thought nothing of it if Swan had not considered it of sufficient consequence to apologize to the ladies, and admitted that he was himself the offending party. Sprigg's act was an actual assault upon Swan. He seized him, jerked him around violently, and told him to get out of the way; and his looks and manner were so grossly insulting that Clabaugh was surprised Swan should bear it so humbly. Swan, however, in the gentleness of his nature, apologised—he admitted he was wrong. Could the most jealous spirit, uninfluenced by personal malevolence, have demanded more? Still Swan was willing to apologise, but he dared not approach Sprigg in his rage. Scollay asks him to go to Sprigg: *he says he cannot, for Sprigg is angry with him, and he has already apologised twice.* Scollay goes then to Sprigg, and tells him what Swan had said; Sprigg becomes more exasperated, and swears he will *either box Swan or spit in his face*; again Scollay goes to Swan, and he says he cannot go to Sprigg to apologise, for he is informed that *Sprigg has threatened to take his life.* Swan tells Mrs. Sprigg, the wife of the cousin of the deceased, that he could not go to Sprigg to apologise, for he was afraid he would strike him—and to James Sprigg, another cousin, he said he could not do it, for fear of a difficulty. Swan could, at that time, no more have approached the deceased than he could have approached a tiger. The treatment he would have received is illustrated by the fact that when Scollay told Sprigg that Swan had apologised twice, he swore he would box him or spit in his face, and by the conduct of Sprigg afterwards, at Cowton's Hotel, when Swan asked him to come out, that he might explain the *postscript* to the printed apology of Sprigg. Sprigg said to him, "*go out, you G—d d—d lying son of a bitch.*" The language of this man was almost too vulgar for decent ears.

Sprigg's intoxication at the ball might have been some excuse for his demoniac fury; but he brooded upon and nursed it, when he should have repented of his passion. He permits Friday to pass, and on Saturday he seeks the man whom he had already insulted and assaulted, and offered him the grossest indignity that can be offered to man—an insult ten-fold more aggravating to a young man fresh from an association with all the chivalry of the American Army in Mexico—an indignity which subjects the object of it to universal scorn and contempt.

This indignity was offered to an unarmed man—Sprigg himself being armed, as he expressed it to Ainsworth, "*to cut out Swan's heart if he raised his hand.*" Swan, astounded and taken off his guard by the suddenness of the attack, and the retreat of Sprigg so quick,—according to the testimony of Mr. Barrell,—that he couldn't strike without running after him. The instant impulse of Swan was

to fight Sprigg a duel. From the beginning to the end of this distressing drama, he scorned to have any advantage. He applies to Barrell to act as his friend—afterwards to Roman, Scollay, Kennedy and Van Lear—they all declined, because they thought it not a case for a duel, and they were not willing to incur the penalties of the act.—Whilst he is talking to Roman, perhaps an hour after the spitting, despairing of getting any one to take a challenge, they see Sprigg in the street, near Dougherty's office. Swan starts in pursuit, having in the meantime obtained his arms. Sprigg, who was so brave against an unarmed man, with his big bowie-knife (the largest the witness ever saw) prepared to cut out Swan's heart, flies for refuge to the office. We are told the wicked flee when no man pursueth; but here was a pursuer—and is was not only to fly, but to lock himself in—to put himself under lock and key. Swan goes to the door to obtain admittance, but is excluded. Soon after Barrell goes to the same place and finds the door locked. He is only admitted when Sprigg is assured Swan is not there.

Balked in this effort to wipe out his disgrace, the prisoner again in the evening seeks out the deceased at the hotel, and invites him to go to the stable or to No. 5, the largest room in the upper story of the house, and fight it out—the deceased refused to go to the stable, but agreed to go to No. 5; he is afraid, however, to go in advance, lest Swan should shoot him. He says "*he made the d—d rascal go before.*" Swan, with a manly tread, goes in advance. When they got to the upper landing, near the door of No. 5, Sprigg's nerve gave way; he feigns sentimentality, and is as tender as a maid; and he whose habitual conversation was of blood and cutting out hearts; who could not speak without oaths and imprecations, is melted to tears.—He thinks of their old associations, and the intimacy of their families; he appeals to Swan, and agrees to make any amends an honorable man could. He subdues by such a display of emotion, the repentment of Swan, and he agrees to apologise for what took place in the ball-room, if Sprigg would apologise for spitting in his face.

Mark now the art and treachery of this proceeding, which had averted the danger of the fight, and put Swan in a false position. In his next conversation with Dougherty, Sprigg tells him that Swan is about making himself ridiculous by taking an apology under such circumstances, viz: first by giving an apology as a condition of his getting one for an act which honorable men say cannot be atoned for by apologies. Sprigg was charmed at the success of his arts, which he believed would more effectually degrade the man he pursued with such unrelenting hate.

But the prisoner, as soon as he was left to his own reflections, sees the absurdity of his own position. He knows that something more was necessary to re-establish him in the respect of his friends. Roman suggests to him the example of Ritchie and Pleasants, at Richmond. He sends the challenge to meet in Perry's meadows, alone,

and fight it out. This appears to have been a game that by no means suited the disposition of the deceased. He told Barrell that "he did not mean to fight with guns and pistols." "*He would take both knives when he fought, and would not run much risk.*" He always had special regard to his own safety. Though deceased is proved by every witness, both for the State and defence, never to have had a thought of meeting the prisoner in the meadow, in the swelling style of a bully he intimates in his publication that he was eager to meet the prisoner there, and his only objection to it was that the prisoner had not named 6 o'clock in the morning, instead of 11 o'clock, as the hour of meeting.

But the deceased thought it was necessary, in order to maintain his character as a bully and fighting man, that he should explain his failure to meet the prisoner, and he afterwards invented the story about the prisoner's wanting to withdraw the challenge, in an interview on the Bank steps, on Sunday night. This invention was palpably an afterthought, and utterly false. If, however, it had been true, it would not have relieved him from the obligation to meet the prisoner; it would have increased it. He said he refused to let the prisoner withdraw the challenge; the challenge was therefore not only subsisting, but he had virtually accepted it—and if the prisoner had not gone to the ground, might have published him as a coward. But we have the concurring statements of the prisoner and deceased both, as to this affair, made at or about the time—one to Scollay by the prisoner—the other by deceased to Wood—corresponding in all their essential features, and demonstrating that deceased's subsequent account was a sheer fabrication. We have not only these, but the testimony of Barrell, that on the same Sunday night on which deceased said the prisoner had desired to withdraw the challenge, at 11 o'clock, he talked with deceased on the subject—that he told him of the challenge, took it out and showed it to him, and said his objection to it was as to the manner in which it was left at the Bar of the Hotel.—Can any rational man believe that if such an interview with the prisoner had taken place, as was described by deceased only a few minutes before, he whose whole soul seems to have been occupied with but one desire—wholly to disgrace the prisoner—would have forgotten an occurrence which rendered the prisoner so trifling and ridiculous. But we do not stop here. After the prisoner had returned from the meadow, on Monday, meeting James Sprigg, the cousin of deceased, he told him "*if he should see Will, to tell him he had been to the meadow, and as he did not meet him, he supposed there was some mistake.*" James Sprigg says he did meet the deceased immediately after, and told him what the prisoner said. What was his answer? Did he then pretend that the prisoner had withdrawn the challenge, or that it was understood they were not to meet? No such thing. He answered "*that Swan had sent him a note which proved him either a fool or a coward.*" He did not pretend that it was withdrawn, or

intimate any thing of the sort. This is the evidence of James Sprigg, the State's witness, and cousin of deceased; and I ask, first, is it probable the prisoner would have sent such a message: and second, would deceased have made such a reply if the challenge had been withdrawn or abandoned? No—the story was therefore a mere subterfuge to cover the recreancy of a bully.

Prisoner heard no more of deceased that day. He goes to Scollay in the evening. He has lost every chance of wiping out his deep degradation. He says to Scollay that "he is now at his wit's end." He cannot get an ordinary duel. He has made effort after effort for a personal contest; he cannot induce the man who wounded him so deeply to meet him—what shall he do? He tells Scollay to go to the deceased and ascertain "*whether he intends to give him any satisfaction.*" Scollay says, "*can it be settled amicably?*"—prisoner says, "*I will be satisfied with an unqualified apology.*" Scollay goes to Dougherty's; they go in search of Sprigg, and find him at Dr. Perry's; prisoner draws up an apology, which is modified by Mr. Semmes; deceased says he will not sign it as long as a certain portion written by the prisoner is retained; prisoner says *he must sign that or none*—and takes out his watch and says to Dougherty, "*unless it is brought back signed in one hour, I will walk up the street, and Mr. Sprigg must defend himself.*" The apology is brought back signed in the hour.

All this was done by the prisoner in the spirit of a brave and manly soldier. But how with the deceased? You will observe he was all the time blaspheming; uttering to Kennedy, Ainsworth and others the most horrid epithets and imprecations; swearing to cut out the prisoner's heart, and showing the horrid bowie-knife with which he would do it. He takes refuge under lock and key in the office when pursued by the prisoner; when invited to No. 5 to fight it out, he escapes under a feigned sentimentality. He bullies about the meeting at the meadow, and professes to desire to meet at 6 o'clock instead of 11, and at last will not meet at all; and when the alternative is presented of a street-fight, or signing the apology in an hour, it is promptly signed.

But what was his deportment then? The scene described by Daniel Bruce must have taken place on this day after the apology was signed; it could not have been on Saturday, for that was the day of the spitting, and the scene at the hotel, when the prisoner invited the deceased to No. 5; it could not have been on Sunday, for that was the day of the challenge to the meadow; it could not have been on Monday, for that was the day for the meeting at the meadow, and in the evening Scollay and Dougherty were negotiating the settlement. It must therefore have been on Tuesday, after the signing of the apology, and when the prisoner went out with so gratified a feeling—with so frank, honest, and generous a sensibility to take Sprigg's hand.—Mark the perfidy of the deceased in this interview. He says to the

prisoner, "*I owe you a thousand apologies;*" but as soon as his back is turned he resorts to his habitual oaths and epithets, and leaves Bruce under the impression that his professions to Swan were not sincere. On the next day, before the ink is fairly dry upon the apology, his soul seems to have been infused with greater gall and bitterness; his fury seems to have increased from having been pent up for a single day; he appears to have had a sense of a loss of consequence by the apology, and that an extraordinary effort was necessary to restore his distinction as a bully. He goes in the oyster-houses and drinking rooms and declares the prisoner a coward; "*he hadn't pluck to shoot a chicken.*" At Donnelly's, in the presence of Wood, Donnelly, Wineour and others, he asserts, "*he signed the apology because Swan was too big a coward to ask any other satisfaction, and to satisfy his (Sprigg's) friends.*" The apology was a mere gratuity, proceeding from the magnanimity of deceased. This was kept up from day to day in the presence of Kennedy, and in all the public houses about town, as testified to by Ainsworth and others.

Swan in the meantime was acting with the reserve and dignity of a gentleman. He indulged none but kind words towards the deceased. He was occupied with but one thought—a thought that springs spontaneously in the mind of every true soldier of his country—it was "*to save his honor,*" as expressed by Kennedy. That honor had been deeply wounded; the story of his disgrace had gone abroad; his friends had been induced by the representations of the deceased to scorn and despise him: they had actually refused to speak to him.—How should he retrieve his character, but by letting his friends at a distance know that he had not been submissive under the gross indignity that had been offered him? And how could he let them know it, but by sending them a copy of the apology, and informing them he had done what is expected of soldiers in such cases? Judge Perry and others advise him to send a copy of the apology to his friends. They are too numerous, and the trouble would be too great to copy them by hand for each one. He has it printed in the form of a circular, on a letter sheet—only *forty* copies. It is necessary also that his friends should know he had challenged Sprigg. How should he do it? Should he publish the challenge with the apology? This would have been more exceptionable to Sprigg than the course that was adopted. Should he get the statements of Scollay and Dougherty and Judge Semmes, who were engaged in the affair? This would have been giving the matter an importance that would probably have produced another agitation, and would only have been suitable for an actual and full publication. But this was not the object of Swan.—He was preparing a communication for his friends only; not for the public. And, remember, when the deceased afterwards got one of them, he had to send Dougherty to the prisoner for it. *He could not obtain one in the town of Cumberland;* so distant was it from the mind of the prisoner to prejudice deceased.

But the gentlemen on the other side say the prisoner was guilty of a grievous sin in publishing the postscript. What was the postscript? That deceased had written the apology in answer to the challenge. I have already shown the difficulty of putting the circular in any other shape, unless the prisoner had given up the idea altogether of letting his friends know he had challenged. Let us now inquire whether, according to the common understanding of men, the postscript was not true—not only in spirit, but in fact. The challenge was dated the 24th of January by mistake—it should have been the 25th. On the 27th, two days after, the apology was received; no communication between the parties being proved to have taken place in the meantime. If a letter had been written on any ordinary business to any of the gentlemen of the Jury, and two days after he had received another, relating to the same subject, would he not have called it an answer, even though it had been procured by the agency of others? This was probably the relation in which the prisoner viewed it. But, it is said, it admitted of the construction that the apology had been extorted through fear. But it never occurred to the prisoner in that light—and no man could have been more deeply afflicted than he, when it was so explained to him. He protested to Kennedy that his only object was to put himself right, and he had not the least idea of calling Sprigg's courage in question. When Dougherty called to get a copy of the circular, and spoke of the postscript, he offered to give him a letter explaining it, as Dougherty says, to exonerate him (D.) from blame;—but is evident from D.'s answer, to *exonerate Sprigg*. D.'s answer was, "it is too late, for Sprigg has determined to publish." If the offer was to exonerate D., there was no sense in his answer. But this was not all; to exonerate and put deceased right, the prisoner sent him a message by Kennedy; wrote one letter to deceased which Kennedy would not suffer to be sent, because, as he expressed it, "it was too truckling;" and afterwards another, which was approved by Kennedy, in which he requested a friendly interview, and offered to explain. Whilst that letter was at the Post Office, the prisoner met deceased on Sunday the 8th of February, at Cowton's Hotel, and asked him in a friendly manner to come out, when he could have no other object but to explain the postscript to the circular, and deceased repelled him with a gross and vulgar violence that is scarcely human, "*Go out, you G—d d—d lying son of a bitch.*"

Not only this, deceased knew the prisoner was willing to explain—he told Semmes that the prisoner had approached him for the purpose, "*but he had repelled the d—d lying scoundrel.*" He also said that he did not believe the prisoner had published the postscript of his own motion, and that: "*he thought he knew the d—d scoundrel who told him to do it.*" But his will was formed as inexorable as fate, to consign the prisoner to everlasting disgrace, or to have the savage satisfaction of cutting out his d—d heart, over which idea he seemed to

gloat with as keen an appetite as a cannibal. He will publish him as "a coward, a liar and a scoundrel;" he will make all honorable men despise him; he will send it to his love, and poison the bosom in which he (Swan) has garnered up his heart and all his heart's dearest treasures. The soul sickens in contemplating the cold, fierce and unrelenting malevolence of a man who could thus make up his mind to destroy one who was anxious to do him justice, and whose offence was not the result of his own feelings, but prompted by another.

Now it is that the deceased determined to have blood, or the last remnant of the prisoner's honorable name. So bitter was his passion and animosity, that he would not even suffer any one to speak well of Swan. He asked Stoddart if it was true that Davis had said that the prisoner had acted like a man, and if he had, "he would slash him out of his boots." He arms himself for the strife of death. The State have attempted to prove that he was not armed—they have tried too much. Such an assumption is against the admissions of his own card, and contradictory of the whole history of the case. The bowie-knife and the revolver, which have never been heard of since his death, were evidently clandestinely abstracted from his pocket. The rogue who overlooked the ram-rod, left irrefragible proof that the pistol was there. He tells Kennedy of his unrelenting purpose to publish the prisoner; that he is armed; that he should go to the prisoner and signify to him that he expected the attack, and was armed to meet it. He does this every day up to the fatal act. He tells Worthington, not more than half an hour before his death, if the prisoner approaches him he will cut out his heart with his knife. Kennedy meets the prisoner, and tells him what deceased had said. Now what occasion could there have been for the prisoner to send a message to the deceased of the intended attack, when deceased had sent him word he expected it, and was armed to meet him? Men who wish to condemn Swan may say that chivalry would have prompted it; but unprejudiced minds will not so regard it, even though they should make no allowance for the strong emotions which necessarily rendered the reflection of the prisoner at that moment incoherent.

At this juncture—the message of deceased having been received—the publication actually in type, having been seen by Swan's friends, and communicated to him—Sprigg comes into the billiard room, and takes a bullying, defiant attitude. Cramer was the only witness present who was not engaged in play, consequently the only one who had an opportunity of seeing what was going on. He only could see the scowling, defying looks; the insulting, sneering aspect of the countenance; the menacing glances. They could only be seen by the prisoner himself, from time to time, as he passed around the table. No man engaged in play could have seen them, if it had not been the result of accident. The testimony of Messrs. Thurston and Sprigg, I consider as amounting to nothing.

Now was the time for the prisoner to act, or never. He was taunt-

ed for permitting Sprigg to escape at the spitting. No such occasion as this had occurred since that day. He had been baffled in every effort to get an honorable fight from Sprigg. He must submit to everlasting degradation, or hunt the wolf where he could find him. No occasion—no circumstances, had occurred like these; to stir the tempest of his soul, and swell an uncontrollable emotion, which overcame the natural repugnance of his heart for such a struggle. He was stung like a wild beast in the amphitheatre—pierced and goaded by his tormentor—baffled at every turn. Would it not have been surprising, if in such an agony, he had not struck? From the testimony of Dougherty, who seems to have so small an appreciation of the sentiments of a brave heart, he and Sprigg, regarding Swan as a coward, were amusing themselves, like vicious, wanton boys, with a beetle or a grasshopper; pulling off its wings, and piercing it with pins. But even a grasshopper may bite.

Swan was no coward. He was gentle and forgiving. These sentiments cannot be appreciated by bullies; they always regard them as evidence of cowardice. His unshrinking spirit in the bloody fights of Contreras, Churubusco, Chapultepec and Molino del Rey established his reputation among those who were eye-witnesses of his courage—a reputation worthy of his descent from General Swan of the Revolution. The gentlemen on the other side say Swan should have had recourse to the law for his protection. But with the ardent feelings of a soldier, what did he know of the law, except that it would more fatally degrade him. Our eloquent friends, who prosecute with so much zeal in this case, though they may now persuade themselves otherwise, I am persuaded would have pointed with contempt at Swan if he had submitted longer.

Let us now for a few moments consider the law of this case. I shall assume that the facts have satisfied you that Swan believed, and had good occasion to believe, that Sprigg had resolved on his destruction. That in the hellish passion; the persevering, unrelenting malignity of Sprigg; his arming, and his threats of cutting out Swan's heart, down to one half hour before his death, justified Swan in the opinion that the only way of saving his own life was by taking the life of his persecutor. If you agree me in this opinion, it was a case of excusable homicide, and the prisoner must be acquitted.—Selfridge's trial, page 7, 1 East's crown law, 271, Wharton's crim. law, 258–59–60.

The learned gentlemen for the State have read you the stern principles of the common law, and insist that you are bound by the inexorable character of those principles. They would allow no distinction between the poisoner and the man who kills from the influence of the highest sentiments of the heart; between the midnight robber and the man who slays the ravisher of his wife or daughter. They speak to you of the criminal code as if it were as inflexible as some iron monarch of the middle ages, who with his grim visage and his savage, unrelenting will, ordered the executioner to let fall the bloody axe when-

ever his passions or his caprice might prompt, without any respect for virtuous sentiments; or as if it were some unrelenting rock of the ocean, which consigned to inevitable and indiscriminate fate, every soul tossed there by the stormy passions of the world. Gentlemen forget that these principles were written in ages of despotism, when all rules were adopted for the oppression of the common people. They applied only to the vulgar and ignorant. They did not apply to gentlemen who could read and write. Even if convicted, a man who could write his name could claim the "benefit of clergy," and they dare not touch a hair of his head. In this day, when no distinctions are made between the rich and the poor, the learned and the unlearned; when we all occupy the same platform of equal rights,—no jury could be found that would not make the proper discrimination.

But under the Constitution of Maryland you are "*jud es of both law and fact.*" Gentleman say you must take the law as it is written in the books; we say not so. The judges know what is written in the books, and if it had been intended to hold rigidly to that, the Constitution would have given the exposition of the law to the judges. It could have been given to the jury for no other purpose but to divorce them from the harsh features of the common law, and enable them to bring the moral elements into the decision of the cause. Juries, from the instincts of humanity, would do this before the Constitution was adopted. Now they are relieved from every difficulty.—If the principles of the common law are harsh and cruel—if they are not adapted to the spirit of the age in which we live—it is your right to modify and even change them. The system of laws under which we now live, has been moulded by the judges. Changes have been made from time to time by the Courts, to suit the changing temper and condition of society. Almost the whole commercial code of this country and England, has been given us by Lord Mansfield. It is the mind, the morals, the temper, the intellect, and the circumstances of a nation which make, modify and alter its system of jurisprudence. The learned gentleman who will conclude this cause may tell you that the judges have built up systems, and not pulled down; but I say to you, they could not have built up new principles as applicable to any subject, without pulling down and abolishing the old ones. It is as much your right to modify the principles in this case, as it was the right of Lord Mansfield to deny to the jury the consideration of the question of malice in actions of libel, of which we have already heard something in the progress of this case. It is equally your right to say, that as malice is an essential ingredient of murder, and as the heart of the prisoner was as free from malice as the heart of a child, he must be acquitted. You are as much judges in this case as my Lord Mansfield ever was.

I am happy to say, gentlemen, that the juries of this country have acted upon my construction of their powers. They would not be restricted in the performance of what humanity told them was right.

Look at the case of young Singleton Mercer, who followed day after day, the seducer of his sister; watched for him on the streets; followed his carriage to a steamboat, watched his opportunity when the person who was riding with him had got out, and shot Heberton, the seducer, through the curtains of the carriage, and called for a fiddle to dance over his corpse. This was a case of deliberate murder, according to Lord Hale; but Mercer was saved by the more beneficent jury law of this country, which is nothing less than the law of humanity, planted by God in the hearts of civilized men. See the case of Stump, in this State, who watched in the garden for days to slay the seducer of his niece—and was acquitted by the jury under the same law; the case of Seiders, in this County, who shot the man who had years before corrupted his wife; of Myers, in Richmond, who shot his victim in his bed; of the woman in Milwaukie, who followed her betrayer to Cincinnati, and shot him deliberately in the street. All these, according to the principles relied upon by our learned friends for the State, were cases of wilful murder; but they prove that those principles do not govern in the administration of the criminal law of this country. They were all acquitted of any crime whatever. If you will permit a hair of Swan's head to suffer, it will not be for malice, for of this you must acquit him, but for a jealous and anxious solicitude with regard to his honor.

Mr. Spencer here drew a contrast between the conduct of Sprigg and Swan, during the pendency of their quarrel; and cited a number of instances in which Sprigg had made contradictory statements of the same facts, to illustrate that no statement he had made was to be relied upon. He also reviewed Sprigg's publication, showing by the evidence on both sides it was nearly all untrue. He then said:

We come now to the condition of Swan's mind at the time of the killing. Remember he was a young man—ardent, enthusiastic. We must not compare him with ourselves. He was proud of having assisted to exalt the flag of his country in so many glorious battles.—He was of a military family; his grandfather was an officer of the Revolution; one of that band of patriots to whom the country owes so great a debt of gratitude. He had been taught, in his association with the chivalry of the army, to value his honor vastly higher than his life. He was insulted and spit upon; called a liar and a scoundrel. He had been balked in every effort to meet his adversary in an honorable way. His acquaintances looked upon him with contempt, and would not recognize him. Cast down, overwhelmed—seeing the dreadful fiend of public scorn scowling upon him—is it surprising that the mind of a young and sensitive man should have given way? A continual anxiety fretted him; “*he thought the little boys were spitting on him.*” He was haunted day and night by the spectre of a never-dying scorn. Sprigg had planted a thorn in his soul—it festered—the inflammation reached the heart—it spread to the brain—the rational organs were implicated and rendered irreg-

ular in their operation—the moral sentiments lost their regulation ;—when the ulcer broke it discharged itself upon the head of him who had made the wound.

Mr. Spencer here referred to Ray's Medical Jurisprudence, pages 27-28, for the purpose of showing that persons are frequently insane upon a particular subject, when they are in full possession of their faculties on all other subjects ; and to 2 Greenleaf's Evidence, section 372, to show that if Swan could not at the time distinguish between right and wrong with regard to the act, he was insane, and not responsible ; and proceeded :

Let us examine the evidence, and see if Swan comes under the principle of these authorities.

See the white and livid aspect of his face—his great agitation—his tremulous hands and limbs—his tears. He vomits at the Justice's office, which the physicians tell you frequently proceeds from a blow on the head, and is a symptom of a pressure on the brain. He declares to every one he is calm, whilst he is wild, perplexed and incoherent. He remembers his sentimental attachment to his step-mother, a feeling perfectly incompatible with a murderer's malice, and says he is going to tell his ma. He wants every one to arrest him—yet persists he has violated neither the law of God nor man. In his innocence, at the Justice's office, he wishes to go to sleep at Judge Perry's or his own office, and is shocked when they tell him he has to go to Jail. He laughs when they put the hobbles on him, and is unconscious he has to meet the consequences of a crime. The State's witnesses say he was more excited than any one they ever saw, who was not crazy. He prays and weeps with the children, and in a few moments after, he asks for brandy and the Pickwick papers. The next morning he sends for a clergyman, and asks him for a sermon he preached a few days before. His conduct to Mr. Neill, one of the State's witnesses, was altogether irrational. He boarded in the same house with Swan ; Swan meets him and asks him to go and dine with him ; he had forgotten they lived together, and Neill reminds him of it ; he then says, come and set along side of me ; Neill does so ; and Swan, ordinarily a sprightly, affable young man, never says a word to him during the dinner. He lays for hours upon the sofa at his step-mother's, day after day, not saying a word to a human being. On the day of Sprigg's death, he sits at Roman's office all the morning, with his head over the back of the chair, taking notice of no one. He writes to Hagerstown that Sprigg is going to kill him, tells Roman the same thing, and asks him to draw up a deed of trust, conveying all his property to Roman, to pay his debts, declaring he did not care what became of the residue of it. There is not a gentleman on that jury who would not consider one of his neighbors crazy, who should make such an application to him ;—an application to appoint a trustee to pay his debts because he was going to be killed—the very thing the law would do, as soon as he should die.—

Swan was a lawyer, and in the exercise of his mental faculties, knew it well. His indifference as to the residue of his property also showed a wild despair, irreconcilable with mental discretion.

With such wild, inconsistent, incoherent and irrational conduct, who can doubt that at the time he had not the proper exercise of his mind, with regard to the act he was committing?—that the continual anxiety and intense solicitude had dethroned his reason? It was like the case spoken of by Dr. McGill, in his testimony, of a lady whose virtuous reputation had been tarnished by the breath of scandal, and who had no means of vindication. It preyed upon her peace, until the canker eat into her brain—her rational powers were destroyed, and she died a maniac. There is a case now in this town of a lady who became insane from intense anxiety in nursing for two weeks a favorite child; the tender cords of the heart and mind giving way under the intensity of care and anxiety. Billingham, who killed the Hon. Spencer Percival, a distinguished member of the British Cabinet, became deranged by anxiety and disappointment at the refusal of a claim he had against the government, and imagined that by killing the Minister he would secure his demands. This goes much beyond our case, but the writers upon medical jurisprudence say it was a clear case of insanity. Such cases are continually occurring. The gentlemen on the other side tell us they must proceed from delusion. They have all proceeded from stern, heart-breaking realities.

But what do the medical gentlemen say in this case? Dr. McGill, a physician of great experience, says he heard the evidence, and considers that "*Swan was laboring under partial insanity—that he could not distinguish between right and wrong as to that act.*"—Scollay says, "*he did not consider his mind in a proper state.*" * * "*He did not know at the time he was doing a thing that was wrong. He was unable to distinguish between right and wrong*"—and they both say, "*any one thing acting intensely upon the mind continually is apt to dethrone it.*"

I have observed the name of Dr. Frederick Dorsey, an old and distinguished physician, of almost unprecedented experience, whose practice has gone through better than half a century, among the witnesses summoned by the State, upon the question of insanity. He was here in attendance, but not examined. What are we to conclude? That his testimony would have corroborated the testimony of the medical gentlemen sworn on the part of the defence. And how could it have been otherwise? The experience not only of every doctor corroborates it, but of every man. How many cases of insanity are continually occurring, the results of misfortune and distress. One man becomes insane from the loss of fortune—another from the treachery of friends, and the slights of the world—another from the disgrace and dishonor of his wife or children—and another because the unsparing hand of death has taken away the consolation of his life. Some go to the mad-house, others, sometimes after dreadful

deeds of violence, will resort to suicide. These are the lamentable illustrations of the frail texture of man's moral and intellectual nature. The pressure is too great to be borne—the temple of the mind is crushed and broken. All such persons if relieved might be restored ; so it is with Swan. You can conceive no case in which a greater mental anguish was suffered than in his case.

Before I conclude, gentlemen, allow me to say a few words in reference to the present position and history of this case. The case originated in Allegany County, and is now being tried in Washington. Who moved it? The State. Swan has been willing and anxious to submit the case to a jury of the County in which both he and the deceased were born, and have always lived. But the State has said, *that* community had too much partiality for Swan, and have moved the case here.

This, gentlemen, in my judgment, ought not to have been, it is not consistent with the beneficence of a just government ; and that it should be allowed, I regard as a stain upon the Constitution of the State. You very well remember that when this Country was a Colony of Great Britain, it was the habit of the British Government to carry our people to England, to be tried by strangers, and this was one of the grievances set forth prominently in the Declaration of Independence. If it was wrong then, to take men among strangers to be tried, it is wrong now ; what was despotic in the English Government, is equally despotic in our own.

The jury trial, when first established, was intended to secure good and faithful men of the *vicinage*, who were supposed to know something of the parties—of their past lives—of the nature of the transaction—and of the witnesses, and were therefore thought more capable of rendering a just verdict. That a man should be permitted to remove his case away from the prejudices of his enemies, is just and merciful ; but that the State should assume to move a case because the community love the accused too well, is depriving him of the benefits of a good name and a virtuous life, and is nothing less than persecution and tyranny.

Does the State attempt to justify itself upon the ground of the unfair summoning of the jury ? The jurors are summoned by its own officer ; and if he be treacherous to the interests of the State, let the law be passed to punish him ; and let not the State justify so great an abomination, as to deprive a man of the benefits of an honest life and a kind heart, upon the ground that it is too feeble to keep its own officers under regulation.

This case originated nearly two years ago. During all the time Swan has been offering himself for trial. He was ready in Allegany at the first term of Court. He has been ready here at every succeeding Court. The order of things has been reversed ; Swan has all the time been pursuing the law ; the law commonly pursues criminals. The law, or the officers of the law, have been pulling back,

and procrastinating, and have been endeavoring to strengthen their hands, in order to strike poor Swan the more fatally. They have gone to the Legislature to procure acts to operate on his case; and during the pendency of these proceedings, the whole course of the criminal law has been sought to be changed. An attempt has even been made to give the State a right of peremptory challenge—a thing which would not have been borne in the days of the greatest despotism in England. During all this time—the State having dragged Swan from those who knew and respected him, and who knew the deceased, and the witnesses, for trial among strangers—every delay has been tortured into an occasion of deeper prejudice against him. He was expected to consent to every step in this course of despotism. Whatever the law could not do of itself, they expected him to agree should be done. There was scarcely anything they did not seem to expect him to consent to, short of building a gallows to hang himself.

If there was any difficulty in the case, gentlemen, it was occasioned by the State's officers. They ought to have known what was lawful, and it is hardly expected, even in civil cases, that men should agree to illegal proceedings against themselves. As to the special appointment, by the State, of the able and eloquent prosecutor in this case, I have nothing to say, further, than that poor Swan has to suffer disadvantages, novel and unprecedented in this portion of Maryland. The distinguished gentleman who comes here to assist the prosecutors for this County and Allegany, and the power that sent him here, are the best judges of their own acts—I will not attempt to criticise them.

But I do think Swan has a substantial grievance to complain of, under a Constitution which guarantees to every man a speedy trial, that he should have been kept for twenty months under the mark of a murderer; deprived of those years of his life when men are commonly laying the foundations of future comfort.

I should entertain no fears of this case, gentlemen, upon a fair consideration of the facts—for you are men of fair, impartial and discriminating minds—but it would be affectation for me to say I do not fear the eloquence of the gentlemen who has the great advantage of closing this case; I know his ability to “make the worse appear the better reason;” I know the winning powers of his address; but I trust to your sound judgment and virtue to resist his fascination. is as dangerous as *“the lips of the strange woman; sweeter than the honeycomb, but the end thereof is bitter as wormwood, for it leadeth unto death.”*

What could the State gain, or the friends of Sprigg gain, if you should make another victim? What has society to gain by consigning to the gallows, or penitentiary, a man of so kind and inoffensive a character as Swan? Is it the mere vengeance of the law that would punish a man that never had a drop of malice in heart? His broth-

ers and sisters have all fallen around him during the last few years—he alone remains; and is justice so fierce that it would bring to an ignominious grave the last solitary scion of that glorious stock of the Revolution.

Gentlemen I say again, if you permit a hair of his head to suffer, he will be a victim to the malice of his enemy, and to his chivalrous regard for his own honor.

SEPTEMBER 29, 1853.

The argument on behalf of the defence was continued.

Mr. Thomas expressed the deep feeling with which he came to a review of the case and spoke of the doubtful propriety of taking human life, either legally or morally; he deprecated the idea of prejudice as between the trial of a rich and a poor man, which his opponents had sought to create, and declared his unfortunate client as without the means of adequately compensating his counsel; he referred to a letter of General Washington, to show that his grandfather, Gen. John Swan, served as an officer in the Revolutionary Army, and adverted to his client's brave acts through all the battles of the Valley of Mexico; he regarded the train of circumstances to which Swan was subjected, during this affair, as inevitably calculated to derange, unsettle, prevent, and so to subvert reason, as to give his client the merciful provisions of the law. He held it to be due to himself to say that he regarded the trial of this cause as before a tribunal not competent to try it; and referred to the circumstances attending the commencement, the selection of judges, removal, and present trial, in explanation of his opinion. He reviewed the testimony with a view to rid the case of such of it as he regarded irrelevant—in showing its discrepancies as against his client—and proving his whole course as manifesting a sole desire to sustain his honor and his fame against the machinations of ill-advised opponents; this portion of his speech was followed by a reference to the law and authorities bearing upon the matters at issue. In regard to the plea of partial insanity, or *monomania*, he cited several cases in which he had been professionally engaged, viz: A man addicted to appropriating horses belonging to others to his own use; another, who, under certain opinions of a religious character, held himself justified in taking a second wife, whilst a former one, with a family, was living; and of others in disposing of their property under strange fancies; all of whom were sane on other subjects except the one specially engrossing their mind, and all of whom had been acquitted of the special charges upon which they were arraigned. To maintain his position he read authorities and law. He arranged the train of incidents in the affair, to exhibit the force of the provocation, ultimately leading to the commission of the fatal deed, in such a graphic style, and flung into the argument so much of pathos and feeling as to give the most decided proof of his having touched a sympathetic chord in the breast of many of those who heard him.

Mr. Thomas having concluded, after speaking nearly four hours, the Court took a recess.

Mr. Price, upon the re-assembling of the Court, followed on the same side.

He said that the jury would do him the justice to say that his opening statement was no exaggeration of the truth of the prisoner's case, but had been fully and even abundantly supported by the evidence.— That if the case had been permitted to take the ordinary course of criminal trials, if no extra efforts had been deemed necessary to convict him, Robert Swan would have been tried and acquitted eighteen months ago. It would not, he hoped, be deemed out of place if he said further, that knowing, as he did, that the prisoner's case was one which neither the prosecution nor the public had ever dreamed of, he had expected that when that case came to be laid before the jury in all its power, the State would without a word surrender this prosecution and submit to a verdict of not guilty. But after the vigorous attempt of the prosecution to shut out the whole of the prisoner's defence and allow him no hearing at all, not even the poor privilege of moving his hand in defence of his life, he knew that every inch of ground was to be contested, and the case pushed with a sternness never witnessed in Western Maryland before.

Mr. Price said that it gave him no pleasure to bring into this discussion the character of the deceased, and if he should be compelled in his defence of his client to say things which must give pain to many an aching heart, it was because he felt compelled to do it.— One of the learned Counsel for the State had spent a considerable time in endeavoring to prove that the prisoner was both a liar and a coward, and harshness and vigor on the one side must lead to harshness on the other. God knows, said he, how willingly he would avoid an exposure which must give pain to his sorrowing mother, whose acquaintance in early life, he often remembered with pleasure, —to his sister, one of the loveliest of her sex; but he had no choice. May God comfort them in their prolonged affliction and give them that consolation which the world cannot give. This is all, however, he could say. His path of duty led him far away from all their sympathies and affections, and that path he must pursue.

He next called the attention of the jury to the case made by the State. What was it? The prosecution first proved the killing, and next proved the intention to kill, and then stopped. That's enough, said the learned Counsel. That was murder of the first degree, and the jury had no choice but to convict the prisoner of that high and heinous offence. The act of the prisoner by which the deceased came to his death was the whole case, we were told; and the circumstances of provocation and outrage out of which that act grew, we were gravely informed had nothing to do with the case this jury were to try.

But the case, thus proved by the State, was never denied by the

defence. They did not come here to controvert the fact of either the killing, or the intention to kill. They admitted them both. The case therefore proved by the State, and the facts and circumstances proved by the prisoner as constituting his defence, stood well together. They might both be true, and a verdict of not guilty, be in no wise inconsistent with the whole case relied upon by the prosecution.

To the case relied upon in chief by the State, the prosecution introduced, in the form of rebutting testimony, a sort of supplement to that case—consisting of the declarations and admissions of the prisoner, both at the time of the act and subsequent to it, from which a character was sought to be given to the act rendering it murder in the first degree. It was true that when acts were unknown, the admissions of the accused were received as evidence to prove them, but when you had, as in this case, all the facts and circumstances of this case distinctly proved by witness after witness, covering a period of more than two weeks; when the prisoner had passed under the eye of the jury from the beginning of this unhappy affair to the close of it, the testimony being full to overflowing upon every point and turn in the case, what did they want with the declaration of the prisoner? Swan had said he was calm and cool, therefore he must have been calm and cool, no matter how the fact may have been, upon the testimony of those who witnessed the act, and gave to the jury in terms which could not be misapprehended the real state of his mind on the occasion referred to.

Mr. Price next proceeded to comment upon the case made by the evidence for the prisoner. Mr. P. said he would begin with one fact. The deceased spit in the prisoners's face! He did it without cause or provocation of any kind—the little occurrence in the ball room being all a pretence. The deceased admitted that he was moved to commit the outrage by an old grudge, which the prisoner had never heard of before. He spit in the prisoner's face and armed himself for the occasion, that if Swan moved his hand towards resenting it, he might butcher him on the spot.

Where did we find the deceased next? In a room, with Swan on the outside endeavoring to get in, and himself in the inside with the door locked to keep him out. After Swan had left the spot, and Barrell came to the door and demanded entrance, the deceased with cautious circumspection called through the key-hole to know who was there, and if any one was with him; and upon being fully satisfied there was no danger, unlocked the door, admitted Barrell and immediately locked it again.

Where did we find him next! At Cowton's hotel, on the evening of the same day. Mr. Price here read from the evidence Swan's statement to Dr. Scollay, and also Sprigg's statement to Wood of the occurrence alluded to. The jury had, therefore, both Swan's story and Sprigg's story, and they both agreed in every particular. Now what was the transaction? Swan had gone there in quest of Sprigg.

Opening the door of the bar-room, he requested Sprigg to come out, that he wished to speak with him. As Sprigg went out of the door he drew his revolver, at which Swan raised his hand and said, not in this place. He told him that the indignity put upon him was too grievous to be borne, that he could not live under it, and that it must be settled. At first proposed that they should go together to the stable, and as each were armed, fight it out there. This Sprigg declined. Swan next invited him to go up stairs to No. 5, a large room in the hotel, lock the door and, settle it there. Sprigg objected that in going up stairs Swan might take some advantage of him. Swan said if such were his apprehensions he would go first, and he led the way. Here was an issue tendered on the one side and accepted on the other, well calculated to put a man's bravery to the test. It was to go by themselves into a room, and after locking out all the world, then join in deadly conflict, the result of which must be that the mangled corps of one or the other, it might be of each, would be left on the floor to be taken thence only to be borne to the grave. Swan marched ahead with as firm a step as he did in storming the hill of Chapultepec. Sprigg followed as far as the landing and then stopped to call a parley. He spoke of the friendship which had always existed between their families—the first time perhaps he ever spoke upon such a subject. Mentioned his love for Robert's deceased brother, John Swan, whom he had spoken of in disparaging terms to Ainsworth. The tears came to his eyes, and yet he told Wood that Swan acted like a baby. He admitted the enormity of the outrage and promised to apologize. Swan was disarmed, as he always was by a soft word. The two young men set down upon the steps and talked the matter over, but, as subsequent events showed, nothing was definitely settled.

Mr. P. then referred to the proposed meeting in Virginia, and of Sprigg's different statements and prevarications in regard to it; also of the apology, and the manner it was brought about; of Sprigg's unwillingness to sign it, until Swan took his stand and gave him one hour to determine what to do; and of the paper being brought to him with Sprigg's name to it within the hour.

Mr. P. then spoke of the publication of this apology, with the attendant circumstances, and showed by a detailed reference to the evidence, that the publication of the apology, with the note appended, was not the real cause of offence to Sprigg, that it was not published with any view of exhibiting Sprigg to disadvantage, and in point of fact, was not published at all. He showed that Sprigg was in the habit of denouncing Swan as well before as after the publication, in public as well as private places, as a liar and a coward. He had been warned, frequently warned, that Swan was no coward and would certainly shoot him. The only effect of the publication was to give him some sort of pretext for what he determined to do at all events.

Mr. P. then spoke of Sprigg's publication, and referred to the evi-

dence of Messrs. Kennedy, Semmes and McKaig, showing his determination to make the publication, right or wrong. He referred with emphasis to the message sent by Sprigg on the day of his death, through Mr. Kennedy, informing Swan that the publication denouncing him as a liar, coward and scoundrel was then in the press and would appear the next day, and that he, Sprigg, was armed. Mr. P. maintained that all the circumstances gave to this message the character of a defiance, and an invitation to a fight, especially when it was considered that it was a part of the same message, that the paper containing the publication was to be sent to Hagerstown, where Swan would least like it to go.

He next referred to the statement which first appeared in the newspapers, and again in Court, that the prisoner had sought out and shot down an unarmed and defenceless man. Swan, he said, had expected, and had every reason to expect, that whenever he met Sprigg it would be to encounter a man, with arms in his hand and a determination in his heart to fight to the last extremity. The circumstances attending the last awful scene, as proved by the State's witnesses, abundantly prove this; according to Somercamp, he held up his gun after shooting Sprigg, and declared that he had more arms about him for other emergencies. Cresswell swore that as soon as he fired his gun he drew a revolver, and immediately returned it. These facts proved the case. If Swan's expectation had been to shoot an unarmed man, a double barreled gun was sufficient; but as he had expected a fight in which the chances of escape were not greater on his side than the other, he provided himself with other arms for other contingencies. And why, asked Mr. P., did he draw his revolver after firing his gun? The question could only be answered in one way—that not seeing, owing to the smoke of his gun, the effect of the last fire, he drew his revolver to continue the fight if his adversary should turn upon him. But immediately after seeing Sprigg on the floor, he returned his revolver. Again on that very morning Sprigg sent him word he was armed. Wood and Wincour had both informed him of Sprigg's threats, and warned him to be on his guard. On that morning, also, he applied to Mr. Roman to prepare a deed of trust providing for the sale of his property and payment of his debts, declaring that he cared not what became of the surplus, it being evident he was looking to the event of his sudden death. Dr. Scollay told him there was no alternative under Heaven but *to fight*. In his letter to his female friend in Hagerstown, he stated that he had received certain information of Sprigg's intention to shoot him, alluded to the probability of his sudden death, and concluded with a request that the letter should be burnt immediately. We know, moreover, that Sprigg was armed, and it was not the least mysterious circumstance in the case, that these arms had suddenly disappeared after Sprigg's death, and had never been seen to the present hour. The ramrod in his pocket, however, like the track in the sand, showed pretty distinctly

whence they had been taken from, when they were concealed.

In reference to the law Mr. P. said, his colleagues had ably explained the law of the case according to our views of it, and he wished to be understood as endorsing all they had said upon that subject. He, however, had some opinions of his own upon the legal branch of the argument, which were very simple—a child might understand them. You sometimes find in society a man whose violent passions and vindictive feelings render him dangerous, and you therefore strive to avoid him. But do what you will, he fastens a quarrel upon you. Without offence or provocation of any kind, he spits in your face, and is armed at the time to butcher you on the spot if you but raise your hand. What are you to do? You procure arms, go in immediate pursuit of him, drive him into the nearest house, where he locks himself up. You afterwards compel him, against his will, to give you an apology of your own dictation, or in the terms recommended by a mutual friend. The next moment he disclaims it, and denounces you in all public places as a liar and coward. What are you to do with such a man? If you appeal to the law, you are disgraced. You know that men would despise you, and women treat you with scorn. The law therefore affords you no protection. You cannot, you dare not, appeal to it. He again asked, what are you to do?

Gentlemen of the jury, nations go to war upon the most trivial pretences. Hostile armies encounter each other and the earth drinks the warm blood of numbers almost without number. Widows and orphans are made by thousands and tens of thousands, in a day—an hour. And yet bonfires blaze on a hundred hills to hail the victory. This is public war. There is also a private right of war.—When God put man into the world, he gave him the right of self-protection, and human laws have not abrogated that right, except in so far as human laws are competent to provide a protection co-extensive with that right. Protection by the law and obedience to the law, are reciprocal, and concurrent as duties and rights.—They exist in conjunction, or they do not exist at all. If the law cannot protect you, what right has the law to punish you? No man is bound to be treated like a dog. He next posts you as a coward and a liar, and sends you word that he is well armed and ready for you. Your friends warn you of your danger. Emboldened by your long forbearance, you feel that your life is no longer safe.—The law can afford no redress, and you are thrown upon the natural right alluded to. You have but one course, and you would be a craven if you did not pursue it promptly. Gentlemen of the jury, if an unchained tiger is upon your track, are you to sit until he springs upon your back and his claws are tearing your limbs asunder? What are you to do, but shoot him? There is no help for it. Such is the advice he would give his own son; and he would ask the blessing of Heaven upon the advice. You are not bound to see the fruit of your own loins a dishonored thing, fit

only to be spit upon, or dragged in the mud. Public meetings may assemble in the dark, to arraign these principles; the press may issue its extras, denouncing them to the world; yet he claimed them as his principles still, and should not cease to avow them before the face of the sun in Heaven. He got them from a source above all human law; and sanctioned, as he believed them to be, by the seal of God himself, let the laws and the statutes of man be silent before them.

Mr. Price then examined the evidence in regard to the prisoner's declarations, previous to, at the time of, and subsequent to the act of killing, and insisted that they neither made a fact, nor altered a fact, proved in this case—that they amounted to nothing. And in conclusion, Mr. P. spoke as follows:

Gentlemen of the jury, you have heard of the distinguished bravery of the prisoner in the great battles of Mexico, but it was after he returned home, as he had well hoped, to the enjoyment of the blessings of peace, and the endearments of home, that trials were in store for him, better fitted to test his manhood, than the terrors of war in their most appalling realities. Forced into a quarrel for which he had no taste; striving to escape from it, but no means of escape allowed him. Pursued, exasperated beyond all human endurance, and at last impelled, against every instinct of his nature, by indignity and outrage, to the shedding of blood, of which no man had ever felt a deeper horror. Thus escaping from one great trouble, it was only to find himself the victim of a varied but more prolonged persecution. The public press, thundering its anathemas at his head, and holding him up to universal execration, as a murderer and a felon. Avoided, shunned as a moral pestilence, by the virtuous and good everywhere. His trial removed by the State upon the simple affidavit of a prosecuting attorney, and then delayed beyond all reason. A super-serviceable Governor putting his hand into the public treasury, and employing Counsel from abroad, to strengthen the arm of public justice, and allow him no mercy. Waiting and waiting, from time to time, to obtain a hearing. His witnesses, after each postponement by the State, scattering over the face of all the earth, to be collected together at the next term, at great trouble and greater cost, only to be dismissed and scattered again. His little patrimony wasted by fees to Counsel and preparations for his trial; and yet all the blame of the delay, by a refinement of cruelty of which his case is the only example within my knowledge, laid at his door and charged to his account; what man, old or young, in this community or any other, has ever borne himself through it all, even up to the present hour, with a braver or more manly fortitude than Robert Swan? No sense of wrong, however galling—no distress of mind, however acute—has ever impelled him into a momentary departure from the most delicate proprieties of life. There is a bravery of action, and a bravery of endurance; and where have either been displayed in brighter perfection than by this boy?

Mr. P.'s address before the jury occupied three hours, and was a full examination of the facts of the case.

SEPTEMBER 30, 1853.

of the Court met at 9 o'clock. Mr. May closed the case on the part The State:

He began by stating he would entirely remove every statement and argument that had been advanced by all the Counsel in the way of throwing prejudice over the prosecution. He declared it had been a valid and just pursuit of a criminal, and that he would show that the prisoner had received more favor than any one in his situation had ever received in Maryland. He vindicated the removal of this case from Allegany, and stated the grounds of it very fully. It was done, he said, to prevent "a packed jury" from discharging the prisoner.

He explained how the delay of the case had happened, and charged that it was solely due to the prisoner and his Counsel; that he could have been tried long ago if he had only consented to it—but he refused when applied to three several times for the purpose.

He denied that an application for an "ex post facto" law had been made, and explained the nature of an "ex post facto" law. He quoted the decision of the Supreme Court and the Bill of rights in support of his views. He read the report made to the Governor by W. Brent, touching the proposed legislation, and showed how fair and just it was, and how it had been made necessary by the imperfect law passed to gratify the feelings and relieve the situation of Judge Perry, and which, though after the fact of the murder, had not been considered ex post facto. It only became so when it was needed to cover a technical defect in favor of the administration of the laws.—He read the Governor's Message to the Legislature on the subject, and commended it in the strongest terms.

He declared his high personal respect for the Governor, and said he was entitled to the respect and confidence of every good citizen for the firm part he had taken in this affair; he vindicated Gov. Lowe in a very conclusive way, and passed an earnest tribute of praise upon him. He said the proposed law had passed the Senate *unanimously* and was only defeated in the House of Delegates by the interest and influence of the friends and Counsel of the prisoner. He then pronounced a strong condemnation on those members of the House of Delegates who had been so weak and false to their public duty, and hoped he would yet see the day when some man of nerve would be found among our State Legislators to denounce and break up the disgraceful system of lobby intriguing, which had so long prevailed at Annapolis.

He proceeded to inquire if he was in a Court-House, or a place dedicated to the administration of the laws? He had heard such extraordinary doctrines of repudiation and nullification from all the Counsel, that he was in some doubt on the subject.

He then proposed to inquire : First—if there was any law to govern the jury, and if so, secondly—what law ?

The first Counsel for the defence had taken the position that the only law was what he called “Jury common law,” and had stated the *verdicts* of some juries in very extraordinary cases, viz: Stump’s case, Mercer’s case, &c., as evidence of what such law was.

The second had said public sentiment, or public opinion, was the the only law since the new Constitution was adopted.

The third, that only the statute of 1809 was to be looked to, and no common law ; no English law, nor any exposition of the statutes was to be consulted, except reason and philosophy.

The fourth, that laws were only binding so long as they gave protection, and as they could give no protection to the wounded honor of his client, they could not be allowed to govern him.

Mr. M. proceeded to consider and analyze their positions. He examined them very critically and severely, and declared they were heretical, monstrous, and subversive of all law and Government—such sentiments and opinions were contrary to professional duty, and a violation of the oath of office, sworn at the Bar.

He could not believe it necessary to argue against the absurdity of calling the attention of jurors to public opinion, for the jury-box must be regarded as closed to all the world beside, and each juror sworn to render a just verdict according to the law and the evidence, without fear, favor, affection, or his peculiar feelings—all else was superfluous. The defence had conducted this trial as making an issue between the prisoner and the deceased, and not upon its just ground as between the State and the prisoner. They claim to establish the degrees of merit and demerit between the prisoner and the deceased ; as though the State (representing the people) had nothing to do with the matter. He went into an examination of the law, as applicable to the case, in contra-distinction to the doctrine of opposing Counsel, as derived from cases to which they had referred ; during which Messrs. Price and Pearre interrupted him by way of explanation. To which Mr. M. replied, that the cases upon which the gentlemen found their theory goes upon the doctrine of the “higher-law ;” that principle by which an individual claims the right of dissolving his connection with society, assuming the position of a state of nature, and forming for himself whatever rules of action might be most compatible with his feelings, inclinations, passions ; for which doctrines he had no kind of respect.

He insisted he had utterly refuted such views, and had ascertained that there was a law for the jury,—as in the new Constitution it is in terms-expressed, and that “the law” was the law of Maryland.

He then stated the law very precisely, and read from the Statute Book, and from American treatises and reports ; he principally used the books referred to by the defence. He very clearly stated the

law of the case of homicide, its degrees, &c., and impressed on the jury the distinctions.

He next examined the evidence which could only apply to the law of the case, and stated the conclusion was irresistible that it was a case of murder in the first degree. He explained at great length the law of murder, manslaughter, and of self-defence—self-defence was only allowed in defence of life, and not of honor. What, he asked, caused the deed? There was no violation of the sacredness of the domestic circle—no putting of the prisoner's life at hazard—which form reasons of justification. It was a case of mere personal pride, of wounded honor. Whoever heard of the acquittal of a person killing another for being spit upon, or threatening to denounce in a publication. The case of Shamberg had been cited as in point by opposing Counsel, but it did not hold good. The defence had proposed to kick all law out of the case, and try it upon precedents.—The code of honor had been invoked in aid of the course of the prisoner; whom Counsel had pictured as the pink of chivalry and honor. He was here to vindicate the law.

He then considered the defence as set up: First—under the plea of justification; and, second—under the plea of insanity.

He reviewed the whole evidence, and examined all the arguments and views of the defence under the first plea. He warmly vindicated the memory and character of the deceased; and drew a parallel between him and the prisoner. He stated the appalling facts of the murder, and in turn applied the features of the shocking catastrophe, to falsify the elements of character for which the prisoner had been praised. He declared in most emphatic terms, that it was "a cold-blooded, deliberate, cruel, and cowardly deed."

He gave the jury some rules of law to aid them in weighing the evidence, and explained how they ought to be applied.

He then examined the plea of insanity; and read from law books and from medical writers; read and expounded the rules applying to this most intricate subject. He fully examined the evidence applying to it, and answered the views of the defence and the opinions of the two Physicians who had testified. He warned the jury of this plea, and said it had only been set up after the other had failed. After his critical examination of both the evidence and science applying to it, he declared that it was a plea without any foundation whatever in this case.

He exhorted the jury to support the law, and strongly insisted that the prisoner was entitled to no privilege; that even-handed justice must be done; that sympathy was only due the poor, the friendless, the ignorant, and not to those who possessed every advantage of life. There was no special law for one case different from that of another—no special privileges. Gentlemen talk of oppression to their client, whilst he is here surrounded by warmly attached friends, and having the benefit of eminent Counsel; and no man, charged with such

a high offence, ever enjoyed more privileges prior to and during the trial. He called on the jury to do their duty under their oaths; to guard society and human life; and wound up with a strong appeal to their responsibility here and hereafter. He then explained the form of their verdict, and concluded.

He spoke 8 hours and 18 minutes.

NOTE.

Mr. Pearre, who made the closing argument for the prisoner upon the question raised on page —, as to the admissibility of Mr. Claibough's testimony in particular, and generally as to all testimony of acts occurring between the deceased and the prisoner, prior to the killing—and whose argument was omitted in its proper place—contended:—

That the facts now offered to be proved, were *acts* which occurred between the prisoner and deceased before the killing; that these acts were an assault made by the deceased upon the body of the prisoner; and that although some time had intervened between these acts and the killing, yet the *Court* had no authority to take into consideration the character of those acts, or how far they acted as a provocation upon the mind of the prisoner. The principle contended for by the State will exclude evidence from the jury, even of the fact of spitting in the face, and confine the evidence alone to the circumstances immediately surrounding the act of killing.

Upon what ground is it that the Court can say, these acts are no provocation or excuse? It must be that the acts offered to be proved are no palliation, or are not sufficient in *law* to afford any palliation or excuse. But this a question for the determination of the jury—they are the judges of the law in the case,—and the sufficiency of the provocation is for their decision. Any act that affords to the jury the slightest evidence of provocation, should be given to them to consider. Even in civil cases the Court cannot take away from the jury any evidence that *tends* to prove the issue.

In cases of homicide, the killing is not the sole issue; and in such a case as this, where the killing is admitted, it is no part of the issue. The issues are various under our Maryland law.

As to murder in the first degree—one issue is, whether there was such malice as would constitute that crime. So as to murder in the second degree. And as to manslaughter, which is killing without malice express or implied, the great issue is, what were the provocations, and how far they go to negative malice altogether.

Now here was a provocation. But we are told it was too long before the killing to evidence to the minds of the jury the want of malice. Whether that be so or not, is for the jury to determine. If the time that has intervened be sufficient to have allowed the prisoner to entirely cool, in the opinions of the jury, then the provocation will not negative the malice. The length of time in which a man's pas-

sions may cool, is not a question of law, as contended by the State; it is a question of fact to be decided by the jury—Roscoe, 739, 1 Russell, 527.

Cooling time is dependent upon the circumstances of each case.—Wharton, 244.

Any question that is to be decided according to the state of facts or circumstances of each case, is most appropriate for the decision of a jury. The line which distinguishes between those provocations which will and which will not extenuate an offence, cannot certainly be defined—Wharton, 237.

It is no law line, certain and fixed, to be decided upon by the Court. In all cases in which human passion, and the emotions of human mind, enter into the elements of a crime, the jury are always more competent to act upon it than the Court. Mingling as jurors do, with the mass of mankind, they are better qualified to form a correct opinion as to the natural effect produced upon the minds of men by provocations, than a Judge, who, in contemplation of law, lives a more secluded life. To decide correctly upon the effect any provocation will have upon any particular individual; to what extent has passions will be aroused thereby; and how long before those passions will cease, in some degree, to influence his conduct and actions, can only be done by an examination into his temperament, his moral nature, and all the circumstances surrounding him—the nature of his associations, and the opinions he had adopted. To spit in one man's face, would drive him to desperation, and there are men in whose face you may spit all day for a five dollar note.

All this is for the jury, not the Court. In Maryland, where the jury decide what constitutes the different grades of homicide, it is for them to decide upon every element that enters into or makes up the crime.

How can a jury decide whether or not a man is guilty of manslaughter, unless they decide whether any provocation offered by the prisoner in extenuation of the killing, is or is not sufficient to reduce it to that grade of crime. To decide upon any such provocation, it must be laid before them. The question is then open for argument before the jury, as to whether the provocation is sufficient or insufficient for that purpose—the jury hear it and decide upon its sufficiency in rendering their verdict.

In England, even, all provocations were admitted in evidence before the jury, however slight and remote they might be; and the Court, when they charged the jury, told them what weight, if any, they should give to the evidence on that point, in rendering their verdict,—and to what extent it palliated or excused the crime. But in this State, where the Court has no power to charge the jury, the evidence must still be given, and the jury give to it such weight as they think it entitled to, in palliating or excusing the offence.

Mr. Pearre said that the effort now made upon the part of the

State, was intended to effect, by ruling out testimony, the same result as would be produced in England by charging the jury; or in other words, to procure the Court to charge the jury, by ruling out the testimony for the defence.

Mr. Pearre argued this question at length, taking many positions and citing many authorities which we have not space to give.

On Wednesday morning, October 5th, at 7½ o'clock, the jury came in, and being asked if they had agreed upon a verdict, answered that they had. The prisoner was then directed to stand up and hold up his right hand, when the Clerk asked, "Do you find the prisoner guilty or not guilty of the murder of Wm. O. Sprigg, as charged in the indictment?" to which the jury, through their foreman, answered "NOT GUILTY."

Mr. HARBINE then moved that the jury be polled, which being done, they each responded "not guilty."

The verdict was hailed by a shout from Swan's friends, and after order had been restored, an interchange of compliments took place between the Court and Counsel, after which the prisoner was discharged and the Court adjourned.

